RENO NEWSPAPERS, INC., A NEVADA CORPORATION, APPELLANT, *v.* MIKE HALEY, WASHOE COUNTY SHERIFF; WASHOE COUNTY SHERIFF'S OFFICE; AND COUNTY OF WASHOE, STATE OF NEVADA, RESPONDENTS.

No. 51697

July 1, 2010 234 P.3d 922

Appeal from a district court order denying a petition for a writ of mandamus in an action seeking access to public records. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Newspaper filed petition for writ of mandamus to compel county sheriff to allow newspaper to inspect and copy post-permit records detailing action taken by sheriff's office on private citizen's concealed firearms permit. The district court denied the petition. Newspaper appealed. The supreme court, HARDESTY, J., held that identity of the permittee of concealed firearms permit, and any post-permit records of investigation, suspension, or revocation were public records open to inspection, unless the records contained information that was expressly declared confidential by statute making applications for concealed firearms permits confidential.

Reversed and remanded with instructions.

Burton Bartlett & Glogovac, Ltd., and *Scott A. Glogovac*, Reno, for Appellant.

Richard A. Gammick, District Attorney, and *Nathan J. Edwards*, Deputy District Attorney, Washoe County, for Respondents.

1. RECORDS.

   Nevada Public Records Act considers all records to be public documents available for inspection unless otherwise explicitly made confidential by statute or by a balancing of public interests against privacy or law enforcement justification for nondisclosure. NRS 239.010.

2. MANDAMUS.

   Ordinarily, a district court's denial of a petition for writ of mandamus is reviewed for an abuse of discretion; however, when the writ petition includes questions of statutory construction, the supreme court will review the district court's decision de novo.

3. RECORDS.

   The supreme court will presume that all public records are open to disclosure unless either (1) the Legislature has expressly and unequivocally created an exemption or exception by statute, or (2) balancing the private or law enforcement interests for nondisclosure against the general policy in favor of an open and accessible government requires restricting public access to government records. NRS 239.010.

4. RECORDS.

Identity of concealed firearms permittee and any post-permit records of investigation, suspension, or revocation were not explicitly confidential under statute making applications for concealed firearms permits confidential, and thus, permittee's identity and such records were public records open to inspection under Nevada Public Records Act, unless the records contained information that was expressly declared confidential by statute, in which event post-permit records of investigation, suspension, or revocation may be subject to redaction. NRS 202.3662, 239.010.

5. RECORDS.

By enacting the Nevada Public Records Act, the Legislature has clearly evidenced its intent to promote principles of democracy by ensuring an open government; therefore, the Act ensures that the government is held accountable for its actions by preventing secrecy. NRS 239.001, 239.010.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider whether NRS 202.3662, which provides that an application for a concealed firearms permit and the sheriff's related investigation of the applicant are confidential, includes within its scope the identity of the permittee of a concealed firearms permit and any records of suspension or revocation generated after a permit is issued.

[Headnote 1]

The Nevada Public Records Act considers all records to be public documents available for inspection unless otherwise explicitly made confidential by statute or by a balancing of public interests against privacy or law enforcement justification for nondisclosure.

Although NRS 202.3662 is plain and unambiguous in its declaration that an application for a concealed firearms permit is confidential, we conclude that the identity of the permittee of a concealed firearms permit, and any post-permit records of investigation, suspension, or revocation, are not declared explicitly to be confidential under NRS 202.3662 and are, therefore, public records under NRS 239.010. However, since post-permit records of investigation, suspension, or revocation may contain information from the application for a concealed firearms permit that is considered confidential under NRS 202.3662, we conclude that post-permit records of investigation of a permit holder, or suspension or revocation of a permit holder's permit, may be subject to redaction under NRS 239.010(3).

FACTS

Appellant Reno Newspapers, Inc., owns and operates the Reno Gazette-Journal (RGJ), a daily newspaper published in Reno, Washoe County, Nevada. Respondent Washoe County Sheriff's Office is an agency of respondent County of Washoe, State of Nevada, and respondent Mike Haley is the Washoe County Sheriff.

Residents of Washoe County may apply for a concealed firearms permit from Haley. Haley oversees the administration and regulation of concealed firearms permits, including the application process, the investigation of applicants before issuance or denial of a permit, the issuance of the permit, and, if appropriate, the suspension or revocation of a permit.

In March 2008, the RGJ received information that Haley had suspended or revoked a concealed firearms permit issued to Nevada Governor Jim Gibbons. Allegedly, the suspension or revocation was based on inaccuracies in the application that Governor Gibbons submitted. Consequently, the RGJ began publishing news articles discussing the possible suspension or revocation of Governor Gibbons's concealed firearms permit.

As part of its news coverage, a reporter with the RGJ requested all records ''detailing the status of any and all [concealed firearms] permits issued by the Washoe County Sheriff's Office to Gov. Jim Gibbons,'' and all ''documents detailing action taken by the Washoe County Sheriff's Office on that permit, including a decision to suspend, revoke, or hold the permit.'' The reporter acknowledged that an application for a concealed firearms permit and any investigations related to the application are confidential. However, the reporter stressed that the RGJ sought information regarding the post-application permit process and not the application.

Haley denied the RGJ's request and refused to provide any information regarding Governor Gibbons's permit. Haley claimed that the permit records are confidential under NRS 202.3662 and that public policy and the need for privacy outweighs the need for public disclosure.

The RGJ filed a petition for writ of mandamus with the district court to compel Haley to allow the RGJ to inspect and copy the requested records. Following a hearing, the district court denied the petition for a writ of mandamus. The district court determined that because NRS 202.3662 makes confidential ''all information contained within [an] application [for a permit],'' any records related to a suspended or revoked permit would necessarily contain information from the application. Therefore, the district court deemed the entirety of the post-application records to be confidential and denied the petition for a writ of mandamus. The RGJ appeals.

DISCUSSION

In resolving this appeal, we consider whether NRS 202.3662, which makes applications for concealed firearms permits confidential, includes within its scope the identity of the permittee of a concealed firearms permit and any records of investigations, suspensions, or revocations that are generated after the permit has issued. To determine NRS 202.3662's scope, this court must first construe that statute in light of Nevada's Public Records Act.

Based on that analysis, this court will address whether NRS 202.3662's confidentiality scope includes (1) the permit holder's name; and (2) records of investigation of a permit holder, or suspension or revocation action taken against a permit holder's permit. Then, we will address whether the private and law enforcement interests in restricting access to concealed weapons permits outweigh the general policy of an open and accessible government.

Standard of review

[Headnote 2]

Ordinarily, a district court denial of a writ petition is reviewed for an abuse of discretion. *Las Vegas Taxpayer Comm. v. City Council*, 125 Nev. 165, 172, 208 P.3d 429, 433-34 (2009). However, when the writ petition includes questions of statutory construction, this court will review the district court's decision de novo. *Id.*

Nevada Public Records Act

[Headnote 3]

Under the Nevada Public Records Act (the Act), all public records generated by government entities are public information and are subject to public inspection unless otherwise declared to be confidential. NRS 239.010. The purpose of the Act is to foster principles of democracy by allowing the public access to information about government activities. NRS 239.001(1); *see DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). In 2007, the Legislature amended the Act to ensure the presumption of openness, and provided that all statutory provisions related to the Act must be construed liberally in favor of the Act's purpose. NRS 239.001(2); 2007 Nev. Stat., ch. 435, § 2, at 2061. In contrast, any exemption, exception, or a balancing of interests that restricts the public's right to access a governmental entity's records must be construed narrowly. NRS 239.001(3); 2007 Nev. Stat., ch. 435, § 2, at 2061. Thus, this court will presume that all public records are open to disclosure unless either (1) the Legislature has expressly and unequivocally created an exemption or exception by statute, *see Cowles Pub. Co. v. Kootenai County Bd.*, 159 P.3d 896, 899 (Idaho 2007) (holding that unless public

records are ''expressly exempted by statute,'' they are presumed to be open to inspection by the public); *Kroeplin v. DNR*, 725 N.W.2d 286, 292 (Wis. Ct. App. 2006) (holding that ''exceptions to the open records law are to be narrowly construed; unless the exception is explicit and unequivocal, we will not hold it to be an exception''); or (2) balancing the private or law enforcement interests for nondisclosure against the general policy in favor of an open and accessible government requires restricting public access to government records. *See Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 635-36, 798 P.2d 144, 147-48 (1990). And, in unity with the underlying policy of ensuring an open and accountable government, the burden is on the government to prove confidentiality by a preponderance of the evidence. NRS 239.0113(2).

Scope of the statutory exception creating confidentiality within NRS 202.3662

[Headnote 4]

The parties dispute the scope of NRS 202.3662, which governs the ''[c]onfidentiality of information about [an] applicant for [a concealed firearms] permit and [a] permittee.'' Haley argues that because an application for a concealed firearms permit and information related to the applicant are confidential under NRS 202.3662, any information generated in a permit that is derived from the application would remain confidential, including the name of both the applicant and the ultimate permittee. Therefore, Haley maintains that the district court properly applied NRS 202.3662 when it determined that the permit and the name of the permit holder were confidential. We disagree.

We recognize that NRS 202.3662 clearly and unambiguously creates an exception to the general rule that concealed firearms permit records are public. However, we have not addressed whether the confidentiality provisions of NRS 202.3662 extend to the name of the permittee or records of investigation, suspension, or revocation of issued permits; therefore, resolution of this appeal requires this court to interpret the statute.

NRS 202.3662 provides, in pertinent part, as follows:

> 1. Except as otherwise provided . . .
>
> (a) An application for a permit, and all information contained within that application; and
>
> (b) All information provided to a sheriff or obtained by a sheriff in the course of his investigation of an applicant,
>
> are confidential.
>
> 2. Any records regarding an applicant or permittee may be released to a law enforcement agency for the purpose of conducting an investigation or prosecution.

> 3. Statistical abstracts of data compiled by a sheriff regarding permits applied for or issued pursuant to NRS 202.3653 to 202.369, inclusive, including, but not limited to, the number of applications received and permits issued, may be released to any person.

The only affirmative grant of confidentiality appears in subsection 1 of NRS 202.3662. This subsection, by its terms, extends the protection of confidentiality only to applications, information within the applications, and information related to the investigation of the applicant.

The statute is notably silent, however, as to whether the name of a permittee, or records generated as part of an investigation, suspension, or revocation of the permit, are confidential. Additionally, Nevada's concealed firearms statutes repeatedly recognize a difference between an applicant and a permittee. NRS 202.3662(2) (''Any records, regarding an applicant or permittee may be released . . . .''); NRS 202.3657(3) (''The sheriff shall deny an application or revoke a permit if he determines that the applicant or permittee: . . . .''); NRS 202.3657(4) (''The sheriff may deny an application or revoke a permit if he receives a sworn affidavit . . . that the applicant or permittee has or may have committed an offense . . . .''); *compare* NRS 202.3665(1) (''If a sheriff who is processing an application for a permit receives notification . . . that the applicant has been: . . . .''), *with* NRS 202.3665(2) (''If a sheriff who has issued a permit to a permittee receives notification . . . that the permittee has been: . . . .'').

Haley makes two arguments to extend to permittees the limited grant of confidentiality for applicants in NRS 202.3662(1). First, he suggests that the Legislature must have intended subsection 1 to apply to both applications and permits because, in providing for the release of statistical abstracts of data ''to any person,'' subsection 3 of NRS 202.3662 expressly refers to ''permits applied for or issued'' and ''the number of applications received and permits issued.'' Second, he argues that because permits grow out of applications and applications are confidential, permits must be confidential too. We disagree.

Whatever merit Haley's arguments might have if we were to read NRS 202.3662 in isolation from the Act, they fail in light of the explicit rules of construction stated in NRS 239.001, which says that open records are the rule, and that exceptions to the rule are narrowly construed:

> 1. The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law;

> 2. The provisions of this chapter must be construed liberally to carry out this important purpose; and
>
> 3. Any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly.

Given this unmistakable declaration of purpose, we cannot credit Haley's argument that the reference to ''permits issued or applied for'' in subsection 3 broadens the grant of confidentiality in subsection 1 from ''applications'' to permits. If the Legislature had intended post-application information about a permit's status to be confidential, it could and would have stated that, but it did not.

Despite Haley's argument that the identity of a permittee is confidential because it is the same name as an applicant, which is confidential, the narrow construction of confidentiality required by the Act and the Legislature's distinction between an applicant and a permittee, does not extend a statutory grant of confidentiality for an applicant to a permittee. The status of an applicant changes to that of a permittee when the permit issues as demonstrated by the concealed firearms statutory scheme and the plain omission of post-permit records from confidentiality in NRS 202.3662.

According to the Act's rules of construction requiring a narrow interpretation of any exception to openness and the Legislature's failure to explicitly grant confidentiality to a permittee, we must conclude that the name of a permittee and post-permit records of investigation, suspension, or revocation of a concealed firearms permit are not explicitly contained within the scope of the confidentiality exception of NRS 202.3662(1).

Balancing of interests—general policy in favor of open government against privacy or law enforcement policy justifications for nondisclosure

In addition to statutory exceptions, the Nevada Public Records Act acknowledges that confidentiality may be granted through a balancing of interests. Prior to the amendment of the Act, this court routinely employed a balancing test when a statute failed to unambiguously declare certain documents to be confidential. *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 635-36, 798 P.2d 144, 147-48 (1990). This balancing test equally weighed the general policy in favor of open government against privacy or law enforcement policy justifications for nondisclosure. *See id.* However, in light of the Legislature's declaration of the rules of construction of the Act—requiring the purpose of the Act to be construed liberally and any restriction to government documents to be construed narrowly—the balancing test under *Bradshaw* now requires a narrower interpretation of private or government interests

promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government. *See* NRS 239.001. We emphasize that the balancing test must be employed in accordance with the underlying policies and rules of construction required by the Nevada Public Records Act. *See id.*

[Headnote 5]

We have previously concluded that, by enacting the Act, the Legislature has clearly evidenced its intent to promote principles of democracy by ensuring an open government. NRS 239.001; NRS 239.010; *DR Partners*, 116 Nev. at 621, 6 P.3d at 468. Therefore, the Act ensures that the government is held accountable for its actions by preventing secrecy. *DR Partners*, 116 Nev. at 621, 6 P.3d at 468.

Nonetheless, we recognize that an individual's privacy is also an important interest, especially because private and personal information may be recorded in government files. *See, e.g.*, *CBS, Inc. v. Block*, 725 P.2d 470 (Cal. 1986). In considering the privacy arguments made by Haley on behalf of permit holders, we consider the argument advanced by the government in this case. *See* NRS 239.0113(2); *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 (stressing that the burden of proof is on the government agency to show why information contained in a record should not be disclosed to the public). Haley argues that if permit records were available to the public, permit holders and the public would be at risk because potential attackers would know that they were armed, or may burglarize their homes to steal their weapons.[1]

Although we have not previously addressed the concerns raised by Haley, we find the California Supreme Court's analysis in *Block* to be persuasive. In *Block*, the California Supreme Court considered whether applications and licenses for concealed firearms were confidential under California law. 725 P.2d at 471. To resolve the case, the court balanced the public's interests in access to information with individual privacy interests. *Id.* at 473-74. One argument advanced by the defendant was that releasing the concealed firearms records would allow potential attackers to more carefully plan a crime. *Id.* at 474. However, the court concluded that the ''[d]efendants' concern . . . is conjectural at best. . . . A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records.'' *Id.* The court also determined that public access may actually deter crimes and does not make a celebrity or other public figure any more public merely because their records are public. *Id.* at 474 n.9.

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[1]Haley's law enforcement and public policy argument for confidentiality is limited to the identity of the permittee and does not address any other law enforcement or public policy concerns supporting confidentiality for records of investigation, suspension, or revocation of a permit.

In this case, like in *Block*, Haley has provided no evidence to support his argument that access to records relating to concealed firearms permits would increase crime or subject a permit holder or the public to an unreasonable risk of harm. Therefore, because Haley bases his argument on the supposition that access would increase the vulnerability of permit holders, we conclude that Haley has not met his burden of proof to show that the government interest clearly outweighs the public's right to access. And because Haley has not met his burden of proof, a narrow reading of NRS 202.3662 mandates that we favor public access over confidentiality.

Therefore, we conclude that Haley has not met his burden to show that the law enforcement or individual privacy concerns outweigh the public's right to access the identity of the permit holder, and in compliance with the policies of the Nevada Public Records Act, the identity of the permittee and any post-permit records identifying the permittee are not confidential.

Not all post-permit records are public documents but may contain confidential information subject to redaction

Next, we consider whether all post-permit records of investigation, suspension, or revocation are confidential. Haley also asserts that all post-permit records are confidential because they, too, may contain information derived from an application for a concealed firearms permit, which is considered confidential under NRS 202.3662. Therefore, he argues, the entire record is confidential. We disagree.

Because NRS 202.3662 is silent concerning the confidentiality of post-permit investigation, suspension, or revocation records, we must conclude that such records are open to public inspection unless they contain information that is expressly declared confidential by statute. The Nevada Public Records Act addresses this situation and recognizes that public documents may contain confidential information. In the event that public records contain confidential information, the Legislature has provided that the records should be redacted and the remaining document open to inspection:

> A government entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.

NRS 239.010(3).

In this case, an investigative report was generated regarding Governor Gibbons's issued concealed firearms permit. Although we determine that the district court erred by making the entirety of the post-permit investigation, suspension, or revocation record sought by the RGJ confidential, we recognize that there may be information included within the record that may be confidential. For example, if the investigative record contains ''information provided to a sheriff or obtained by a sheriff in the course of his investigation [as] an applicant,'' the information generated prior to the issuance of the permit and as part of the application process would remain confidential. NRS 202.3662(1)(b). Therefore, the district court must review the post-permit investigation, suspension, or revocation record to determine whether it contains information within either the application or the post-application investigation that is explicitly made confidential under NRS 202.3662. In such event, the district court must order the redaction of confidential information from the post-permit record under NRS 202.3662(1)(b).

Accordingly, we reverse the district court's order denying the petition for a writ of mandamus and remand the case to the district court with instructions to evaluate the contents of the post-permit investigation, suspension, or revocation records sought by the RGJ to determine whether information within the requested records contains confidential information under NRS 202.3662. If the district court determines that the requested records contain such confidential information, the records should be redacted and the remaining records made available to the RGJ for inspection and copying.

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

RENOWN HEALTH, INC., FKA WASHOE MEDICAL CENTER, INC., APPELLANT, *v.* BETTY VANDERFORD, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF CHRISTOPHER WALL, A MINOR, RESPONDENT.

No. 51755

July 1, 2010 235 P.3d 614

Appeal from a district court order dismissing a medical malpractice action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Parent of minor patient, who, as a result of his illness, suffered permanent, debilitating injuries, including brain damage, brought malpractice action against hospital. The district court granted partial summary judgment for parent, and hospital appealed. The supreme court, PARRAGUIRRE, C.J., held that: (1) hospital did not have an absolute nondelegable duty to provide nonnegligent medical care to emergency room patient through doctors who were independent contractors and (2) hospital could be held liable for the acts of its independent contractor emergency room doctors under the ostensible agency doctrine.

Reversed.

CHERRY, J., with whom SAITTA and GIBBONS, JJ., agreed, dissented.

Piscevich & Fenner and *Margo Piscevich*, Reno; *Molof & Vohl* and *Robert C. Vohl*, Reno, for Appellant.

John P. Echeverria, Reno; *Durney & Brennan* and *Peter D. Durney*, Reno, for Respondent.

Bradley Drendel & Jeanney and *Bill Bradley*, Reno, for Amicus Curiae Nevada Justice Association.

Lewis & Roca, LLP, and *Daniel F. Polsenberg* and *Jennifer B. Anderson*, Las Vegas, for Amicus Curiae Nevada Hospital Association.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and *D. Lee Roberts, Jr.*, and *Rosemary Missisian*, Las Vegas, for Amicus Curiae Catholic Healthcare West.

1. APPEAL AND ERROR.

The supreme court reviews a district court's decision to grant summary judgment and its conclusions regarding questions of law de novo, without deference to the findings of the lower court.

2. HEALTH.
   Hospital did not have an absolute nondelegable duty to provide nonnegligent medical care to emergency room patient through doctors who were independent contractors; Nevada's statutory scheme regulating hospital emergency room care did not provide a basis for imposing absolute nondelegable duty on hospital, the Joint Committee on the Accreditation of Health Organizations (JCAHO) standards, with which hospital complied, did not require an absolute nondelegable duty, and instead, these requirements emphasized hospital's role as a policy-setter and administrator, and supreme court would not impose an absolute nondelegable duty on hospital based upon public policy. NRS 439B.010 *et seq*.
3. HEALTH.
   Generally, hospitals are not vicariously liable for the acts of independent contractor doctors, and imposition of an absolute nondelegable duty is an exception to this general rule; an absolute nondelegable duty is essentially a strict liability concept, where, despite delegation of a duty to an independent contractor, the principal remains primarily responsible for improper performance. Restatement (Second) of Torts § 409 (1965).
4. CONSTITUTIONAL LAW.
   The supreme court may refuse to decide an issue if it involves policy questions better left to the Legislature.
5. HEALTH.
   Hospital could be held liable for the acts of its independent contractor emergency room doctors under the ostensible agency doctrine; patient entrusted himself to hospital by going to its emergency room, and patient did not choose a doctor, but was subject to the choice by hospital.
6. HEALTH.
   Ostensible agency applies when a patient goes to the hospital and the hospital selects the doctor to treat the patient, such that it is reasonable for the patient to assume the doctor is an agent of the hospital.
7. HEALTH.
   Hospitals may be held liable for the acts of independent contractor emergency room doctors if the hospital selects the doctor and it is reasonable for the patient to assume that the doctor is an agent of the hospital.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, C.J.:

In this appeal, we consider whether hospitals owe an absolute nondelegable duty to provide competent medical care to their emergency room patients through independent contractor doctors. Although the parties settled in this matter, appellant Renown Health, Inc., reserved its right to appeal the district court's interlocutory order granting partial summary judgment based on the imposition of a nondelegable duty. A portion of the settlement remains contingent upon this appeal. We conclude that no such absolute duty exists under Nevada law, nor are we at this time will-

ing to judicially create one. Accordingly, we reverse the district court's grant of partial summary judgment insomuch as the district court concluded that hospitals have such a nondelegable duty. We hold that Renown may be liable for patient injuries under the ostensible agency doctrine that we previously recognized in *Schlotfeldt v. Charter Hospital of Las Vegas*, 112 Nev. 42, 910 P.2d 271 (1996).[1]

FACTS AND PROCEDURAL HISTORY

This appeal arises from the tragic illness of respondent Betty Vanderford's minor son Christopher Wall. After he complained of headaches, nausea, and fever, Vanderford took Christopher to Renown's emergency room on four different occasions. During the first visit, tests were performed and Christopher was discharged and referred to a specialist. On the second visit, he was given a prescription for an antibiotic and again discharged. On the third visit, Christopher was given a prescription for Vicodin and encouraged to continue taking his antibiotic. Different doctors attended to him on each of these visits.

Vanderford took Christopher to Renown's emergency room for a fourth time after she found him unconscious in the bathroom. At that time, he was diagnosed with basilar meningitis and complications including abscesses. As a result of his illness, Christopher suffered permanent, debilitating injuries, including brain damage.

Vanderford sued Renown in her individual capacity and on behalf of Christopher. The district court granted partial summary judgment for Vanderford, finding that Renown owed Christopher an absolute nondelegable duty such that it was liable for the acts of the emergency room doctors, who were independent contractors.

The district court provided four bases to support its conclusion that hospitals owe an absolute nondelegable duty to their emergency room patients. The district court relied on Nevada statutes, the Joint Committee on the Accreditation of Health Organizations (JCAHO) standards, with which Renown complied, public policy, and common law principles found in sections 428 and 429 of the Restatement (Second) of Torts and cases from Alaska and South Carolina to impose an absolute nondelegable duty as a matter of law. The district court distinguished *Oehler v. Humana, Inc.*, 105 Nev. 348, 775 P.2d 1271 (1989), and *Schlotfeldt v. Charter Hospital of Las Vegas*, 112 Nev. 42, 910 P.2d 271 (1996), stating that neither case involved an emergency room patient and an independent contractor doctor. Vanderford and Renown agreed on a set-

[1]We do not address whether this case supports a finding of ostensible agency because it involves unresolved questions of fact.

tlement, resolving all issues except the duty issue, on which Renown reserved its right to appeal.

DISCUSSION

Renown argues that the district court erred by concluding that it had an absolute nondelegable duty to provide competent medical care to its emergency room patients through its independent contractor doctors because no basis for imposing such a duty exists under Nevada law. Renown therefore argues that the district court erred by granting partial summary judgment in this case. We agree. We also discuss the ostensible agency doctrine as applied to emergency room scenarios like the one in this case.

Standard of review

[Headnote 1]

We review a district court's decision to grant summary judgment and its conclusions regarding questions of law de novo, without deference to the findings of the lower court. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002).

The district court erred in imposing an absolute nondelegable duty on Renown

[Headnote 2]

The district court based its decision to impose an absolute nondelegable duty on Renown on Nevada's statutory scheme, the JCAHO standards, public policy, and the common law. However, we conclude that the district court erred in this determination because there is no basis in Nevada law for imposing such a duty.

[Headnote 3]

Generally, hospitals are not vicariously liable for the acts of independent contractor doctors. *Oehler v. Humana, Inc.*, 105 Nev. 348, 351, 775 P.2d 1271, 1273 (1989); *see* Restatement (Second) of Torts § 409 (1965). The imposition of an absolute nondelegable duty is an exception to this general rule. Restatement (Second) of Torts § 409 (1965). An absolute nondelegable duty is essentially a strict liability concept, where, despite delegation of a duty to an independent contractor, the principal remains primarily responsible for improper performance. *See Black's Law Dictionary* 544 (8th ed. 2004). While we have recognized some exceptions to the general rule that hospitals are not vicariously liable for the acts of independent contractor doctors, *see, e.g.*, *Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, 910 P.2d 271 (1996), there is no legal or policy basis for imposing an absolute nondelegable duty on

Renown, and we decline to adopt one for the reasons set forth below.

First, Nevada's statutory scheme regulating hospital emergency room care does not provide a basis for imposing an absolute nondelegable duty on hospitals. *See* NRS Chapter 439B. The provisions create a scheme under which a hospital is a policy-setter and overseer, and the provisions contemplate the delegation of medical care to qualified professionals. *See, e.g.*, NRS 439B.410. Similarly, the Nevada Administrative Code highlights a hospital's administrative and supervisory role, requiring that hospitals set procedure and ensure that policies and provisions conform to national standards. *See, e.g.*, NAC 449.331, 449.349, 449.3622.

Second, the JCAHO standards, with which Renown complied, do not require an absolute nondelegable duty. Instead, these requirements again emphasize a hospital's role as a policy-setter and administrator. JCAHO, *Accreditations Manual for Hospitals, Emergency Services*, Standards I-V.

[Headnote 4]

Third, we decline to impose an absolute nondelegable duty on hospitals based upon public policy. This court may refuse to decide an issue if it involves policy questions better left to the Legislature. *Nevada Hwy. Patrol v. State, Dep't Mtr. Veh.*, 107 Nev. 547, 550-51, 815 P.2d 608, 610-11 (1991); *see also Niece v. Elmview Group Home*, 929 P.2d 420, 428 (Wash. 1997) (noting that the policy decision to expand the scope of an employer's liability for an employee's intentional acts against a person to whom the employer owes a duty of care ''should be left to the legislature''). The Legislature has heavily regulated hospitals and would have codified a nondelegable duty to emergency room patients if the Legislature had intended such a duty to be imposed on hospitals.

Finally, the common law relied upon by the district court and Vanderford does not support the imposition of an absolute nondelegable duty. In *Jackson v. Power*, 743 P.2d 1376 (Alaska 1987), the Alaska Supreme Court imposed a nondelegable duty on hospitals, holding them vicariously liable for a doctor's negligence when a patient visits the emergency room and the hospital assigns a doctor to the patient. *Id.* at 1385. But subsequently, the Alaska Legislature modified this holding, passing a law that allows hospitals to rebut the nondelegable duty by proving it was unreasonable for the patient to assume that the hospital provided care because the patient had notice of the doctor's independent contractor status. Alaska Stat. § 09.65.096 (2008).[2] Further, in *Fletcher v. South*

[2]This legislative modification of the *Jackson* holding was recognized in *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1067 (Alaska 2002).

Peninsula Hospital, the Alaska Supreme Court refused to extend the nondelegable duty to operating rooms. 71 P.3d 833, 839 (Alaska 2003).

Here, the district court also relied on caselaw from South Carolina. In *Simmons v. Tuomey Regional Medical Center* (*Simmons I*), 498 S.E.2d 408 (S.C. Ct. App. 1998), a case involving hospitals' duties in the emergency room setting, the South Carolina Court of Appeals reversed a district court grant of summary judgment for a hospital, deciding that public reliance and regulations imposed on hospitals ''created an absolute duty for hospitals to provide competent medical care in their emergency rooms.'' *Id.* at 411. On appeal, the South Carolina Supreme Court modified the absolute nondelegable duty adopted by the court in *Simmons I*. *Simmons v. Tuomey Regional Medical Center* (*Simmons II*), 533 S.E.2d 312, 322 (S.C. 2000). The *Simmons II* court concluded that most jurisdictions hold hospitals liable for the acts of independent contractor doctors under various theories, and this result remains the same, ''whether it is through a theory of apparent agency or nondelegable duty.'' *Id.* at 320. The modified approach of *Simmons II*, called a nonabsolute nondelegable duty, expressly adopted the Restatement (Second) of Torts section 429, which is also ''sometimes described as ostensible agency.'' *Simmons II*, 533 S.E.2d at 322. Under section 429, the injured patient must show that the hospital held itself out to the public by providing services, that the patient looked to the hospital and not an individual doctor for care, and that a patient in similar circumstances would reasonably have believed that the physician was a hospital employee. *Id.* When the patient can demonstrate genuine issues of material fact exist as to these factors, ''summary judgment is not appropriate.'' *Id.* at 323.

In examining the caselaw cited by the district court and by Vanderford to support an absolute nondelegable duty, we conclude that these cases, while labeling their approaches as a nondelegable duty, actually require the same analysis as our ostensible agency approach in *Schlotfeldt v. Charter Hospital of Las Vegas*, 112 Nev. 42, 910 P.2d 271 (1996). Once a ''nondelegable'' duty becomes nonabsolute, as described in *Simmons II*, the duty is no longer truly nondelegable. *See Simmons II*, 533 S.E. 2d at 322. As noted above, a nondelegable duty is a strict liability concept. Thus, a ''nondelegable'' duty that is not absolute veers away from the concept of strict liability, and creates a duty that is not actually nondelegable. A nonabsolute nondelegable duty is much closer to the ostensible agency approach and is not truly a nondelegable duty at all. Based on the above, we conclude that the district court erred by imposing an absolute nondelegable duty on Renown. However,

we still must address the ostensible agency doctrine as a basis for holding hospitals liable for the acts of their independent contractor emergency room doctors.

Hospitals may be liable for the acts of their independent contractor doctors under the ostensible agency doctrine adopted in Schlotfeldt

[Headnote 5]

Given our prior holding in *Schlotfeldt v. Charter Hospital of Las Vegas*, where we adopted the ostensible agency doctrine, we conclude that Renown could be held liable under that theory. 112 Nev. 42, 48, 910 P.2d 271, 275 (1996).

In *Schlotfeldt*, we considered the acts of an independent contractor doctor who attended to a patient at a drug and alcohol treatment center. *Id*. at 43-44, 910 P.2d at 272. The independent contractor doctor attended to Schlotfeldt at the request of a Charter Hospital psychiatrist who was busy with other patients. *Id*. Charter did not release Schlotfeldt, despite her requests to return home, because, based on the independent contractor doctor's conclusions, she was a suicide risk and releasing her would be imprudent. *Id*. at 44, 910 P.2d at 272. The patient sued the treatment center for false imprisonment, and the district court instructed the jury that the treatment center was vicariously liable for the doctor's acts because the treatment center chose the doctor to examine Schlotfeldt. *Id*. at 46-47, 910 P.2d 274. Charter opposed such an instruction because the existence of an agency relationship between Charter and the doctor was a question of fact for the jury. *Id*. at 48, 910 P.2d at 275.

[Headnote 6]

We agreed with Charter. *Id*. at 49, 910 P.2d at 275. Consequently, we adopted an approach known as ostensible agency, which applies when a patient goes to the hospital and the hospital selects the doctor to treat the patient, such that it is reasonable for the patient to assume the doctor is an agent of the hospital. *Id*. at 48, 910 P.2d at 275. We identified typical fact questions that arise under ostensible agency, including: (1) whether the patient entrusted herself to the hospital, (2) whether the hospital selected the doctor, (3) whether the patient reasonably believed the doctor was an agent of the hospital, and (4) whether the patient had notice of the doctor's independent contractor status. *Id*. at 49, 910 P.2d at 275. Whether a patient can demonstrate these factors remains a question for the jury. *Id*. at 48-49, 910 P.2d at 275.

Here, we see no compelling reason why *Schlotfeldt* should not apply to substantially similar factual scenarios that involve inde-

pendent contractor emergency room doctors. Like the patient in *Schlotfeldt*, Vanderford and Christopher entrusted themselves to Renown by going to its emergency room. They did not choose a doctor for Christopher, but were subject to the choice by Renown, as is the case in most emergency room scenarios. The remaining two questions, focusing on Vanderford's reasonable beliefs and whether Vanderford had notice, are subject to the jury's fact-finding but present a situation quite similar to the treatment center discussed in *Schlotfeldt*. Public policy supports this decision as well because under an ostensible agency approach, hospitals may be liable for the malpractice of independent contractor emergency room physicians. This theory allows tort victims recovery by demonstrating facts that are often present in an emergency room setting, while not judicially creating an absolute duty on hospitals that is better left to the Legislature to impose.

[Headnote 7]

Moreover, the typical questions of fact discussed in *Schlotfeldt* that make up the ostensible agency inquiry are similar to section 429 of the Restatement (Second) of Torts and the nonabsolute nondelegable duty adopted in *Simmons II*. *See Schlotfeldt*, 112 Nev. at 49, 910 P.2d at 275. The *Simmons II* approach presents an approach no different than the ostensible agency doctrine we articulated in *Schlotfeldt*. Whether it is called a nonabsolute nondelegable duty or ostensible agency, the result remains the same: hospitals may be held liable for the acts of independent contractor emergency room doctors if the hospital selects the doctor and it is reasonable for the patient to assume that the doctor is an agent of the hospital.

CONCLUSION

For the foregoing reasons, we conclude that hospitals do not have an absolute nondelegable duty to provide nonnegligent medical care to emergency room patients through doctors who are independent contractors. However, we extend the ostensible agency doctrine of *Schlotfeldt* to emergency room scenarios. We therefore conclude that Renown may be held liable for the acts of its independent contractor emergency room doctors under this approach. Because the district court improperly imposed an absolute nondelegable duty on Renown, we reverse the decision of the district court insomuch as it imposed upon Renown a nondelegable duty to provide competent medical care to its emergency room patients through independent contractor doctors.

HARDESTY, DOUGLAS, and PICKERING, JJ., concur.

CHERRY, J., with whom SAITTA and GIBBONS, JJ., agree, dissenting:

I agree with the majority that Nevada law does not currently support the imposition of an absolute nondelegable duty upon hospitals to render competent services to its emergency room patients. I also agree that the ostensible agency doctrine, previously discussed by this court in *Schlotfeldt v. Charter Hospital of Las Vegas*, 112 Nev. 42, 910 P.2d 271 (1996), provides a natural extension to the emergency room scenario contemplated here. However, given the public policy considerations, I would adopt the nonabsolute nondelegable duty approach, as the Supreme Court of South Carolina decided in *Simmons v. Tuomey Regional Medical Center* (*Simmons II*), 533 S.E.2d 312 (S.C. 2000).

Emergency room patients may base their decisions regarding care largely upon hospital advertising and the reputation of the hospital as an entity. These patients do not seek out individual doctors, but expect the hospital to provide competent emergency room care. Hospitals should not be able to escape liability for the malpractice of independent contractor emergency room doctors when hospitals hold themselves out to the public in this manner. The *Simmons II* approach accounts for this commercialization of medicine and the ''public perception of the unity of a hospital and its emergency room.'' *Id.* at 322.

Further, some emergency room patients may be required to seek treatment at specific hospital emergency rooms due to contracts with their insurance carriers. In creating a contractual relationship with insurance companies, hospitals limit patient choice and assure themselves a certain portion of emergency room business.

For these reasons, I respectfully dissent.

LINDA G. STRICKLAND, APPELLANT, *v.* EDWARD WAYMIRE, CHRISTINE MILBURN, ROBERT DRANEY, AND OTHERS SIMILARLY SITUATED, RESPONDENTS.

No. 55290

TRAVIS CHANDLER, APPELLANT, *v.* EDWARD WAYMIRE, CHRISTINE MILBURN, ROBERT DRANEY, AND OTHERS SIMILARLY SITUATED, RESPONDENTS.

No. 55551

July 1, 2010 235 P.3d 605

Consolidated proper person appeals from a district court summary judgment ordering appellants' recall elections to proceed. First Judicial District Court, Carson City; James Todd Russell, Judge.

Voters brought action to recall city council members. The district court granted summary judgment in favor of voters. City council members appealed. The supreme court, PICKERING, J., held that: (1) only those who actually voted in relevant election could qualify recall petition, and (2) this limitation did not abridge voters' right to access to the ballot.

Reversed.

Linda G. Strickland, Boulder City, in Proper Person.

Travis Chandler, Boulder City, in Proper Person.

Mueller Hinds & Associates and *Chad N. Dennie*, Las Vegas, for Respondents.

1. CONSTITUTIONAL LAW.
   In interpreting a state constitutional provision, the supreme court is guided by the principle that the constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.
2. CONSTITUTIONAL LAW.
   When a constitutional provision's language is clear on its face, the supreme court will not go beyond that language in determining the voters' intent.
3. CONSTITUTIONAL LAW.
   If a constitutional provision's language is ambiguous, meaning that it is susceptible to two or more reasonable but inconsistent interpretations, the supreme court may look to the provision's history, public policy, and reason to determine what the voters intended.
4. OFFICERS AND PUBLIC EMPLOYEES.
   State constitutional provision governing recall elections limited those who could qualify a recall petition to those registered voters who had ac-

tually voted in the original election; provision differentiated between registered voters and those who actually voted, ''actually voted'' language was added by amendment, evidencing a legislative intent to limit those who could qualify a petition, public policy favored making recall process more difficult, and provision was not required to be construed in light of subsequently enacted legislation providing otherwise. Const. art. 2, § 9.

5. OFFICERS AND PUBLIC EMPLOYEES.
A recall election involves a ''do-over'' of an already-concluded election ahead of the next-scheduled election. Const. art. 2, § 9.

6. OFFICERS AND PUBLIC EMPLOYEES.
It is not unreasonable to limit the beginning, petition-stage part of the recall process to those who turned out to vote the first time around; then, if the petition qualifies and a special election gets set, all registered voters participate in deciding whether to retain or replace the targeted official. Const. art. 2, § 9.

7. CONSTITUTIONAL LAW.
Rules of statutory construction apply to constitutional interpretation.

8. OFFICERS AND PUBLIC EMPLOYEES.
An act for recall should be liberally construed with a view to promote the purpose for which it was enacted.

9. OFFICERS AND PUBLIC EMPLOYEES.
The state has a particular interest in safeguarding the recall procedure given that a recall petition attacks a public official whom the public has already once elected and, if successful, requires a costly special election at the taxpayers' expense. Const. art. 2, § 9.

10. CONSTITUTIONAL LAW.
The constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes must be construed consistent with the constitution and rejected if inconsistent therewith.

11. CONSTITUTIONAL LAW; OFFICERS AND PUBLIC EMPLOYEES.
Limitation on registered voters who could qualify a recall petition to those that actually voted in relevant election in state constitutional provision governing recall elections did not abridge voters' right to have access to the ballot; provision did not limit those registered voters who could vote in the special election called as a result of the qualifying recall petition, but instead was only a regulation of the recall petition itself. Const. art. 2, § 9; U.S. CONST. amend. 14.

12. OFFICERS AND PUBLIC EMPLOYEES.
A special election called as a result of a qualifying recall petition is open to all registered voters on equal terms. Const. art. 2, § 9.

13. OFFICERS AND PUBLIC EMPLOYEES.
The state has an important interest in promoting the efficient regulation of recall petitions so that some sort of order, rather than chaos accompanies the process and so that a costly special election at the taxpayers' expense ahead of the next-scheduled election is not called except as provided in the state constitution. Const. art. 2, § 9.

14. CONSTITUTIONAL LAW.
Differentiating between who can initiate a recall petition and who can vote at the special election that follows the filing of a qualified recall petition does not offend the Fourteenth Amendment. Const. art. 2, § 9; U.S. CONST. amend. 14.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

These consolidated appeals require us to interpret Article 2, Section 9 of the Nevada Constitution, which subjects every public officer in Nevada to recall by special election upon the filing of a qualifying recall petition signed by ''not less than twenty-five percent (25%) of the number'' of registered voters ''who actually voted in the state or in the county, district, or municipality [that the officer] represents, at the election in which [the officer] was elected.'' Nev. Const. art. 2, § 9.

The question presented is whose signature counts toward the 25 percent needed to qualify a recall petition. Is it any registered voter, as the district court held? Or must the signatures come from those registered voters who in fact—''actually''—voted at the election in which the public officer was elected, as the Secretary of State and the Attorney General have concluded? Reasonable policy arguments exist on both sides. But Article 2, Section 9's text and relevant history convince us that the latter reading is more faithful to the provision's test and the evident understanding of the citizens who enacted it. We therefore reverse.

I.

Appellants Linda Strickland and Travis Chandler were elected to the Boulder City Council in 2007: Strickland as a result of achieving an absolute majority in the April 2007 primary; Chandler, in the June 2007 general election that followed. In 2008, separate recall petitions were circulated against each of them. Enough people signed to qualify the petitions, if the signers only needed to be registered voters. However, not everyone who signed the petitions actually voted in the 2007 primary and general elections that seated Strickland and Chandler, respectively. Counting only the signatures of people who voted in the relevant election, neither petition met the 25 percent needed to qualify.

Respondents are Boulder City citizens who submitted the petitions to recall Strickland and Chandler to the Secretary of State in June 2008. In March and May 2008, before the petitions were submitted, the Secretary of State and Attorney General issued separate letter rulings, in which they interpreted Article 2, Section 9 to require that a qualifying recall petition be signed by voters who actually voted in the officer's election, comprising 25 percent of the total voter turnout for that election. Consistent with these rulings, the Secretary of State rejected the petitions to recall Strickland and Chandler. Dissatisfied, respondents sued pursuant to NRS 293.12795(3).

Not much happened in the suit (beyond Strickland and Chandler intervening to support the defendant Secretary of State) until September 2009, when respondents moved for summary judgment. They based their motion mainly on Senate Bill (S.B.) 156, which the 2009 Nevada Legislature passed in response to the interpretations given Article 2, Section 9 of the Nevada Constitution by the Secretary of State and Attorney General and the failed recall petitions against Strickland and Chandler. S.B. 156 amends NRS 306.020(2), effective October 1, 2009, to provide that a ''petition to recall a public officer may be signed by any registered voter of the [locale] that the public officer represents, regardless of whether the registered voter cast a ballot in the election at which the public officer was elected.'' 2009 Nev. Stat., ch. 61, § 1, at 168.

By order dated January 7, 2010, the district court granted summary judgment, validating the recall petitions against Strickland and Chandler. This appeal timely followed. We ordered a stay pending briefing, argument, and decision and now reverse.

II.

A.

[Headnotes 1-3]

We begin with the text of Article 2, Section 9 of the Nevada Constitution, in particular, its first two and final sentences, which state:

> Every public officer in the State of Nevada is subject, as herein provided, to recall from office by the registered voters of the state, or of the county, district, or municipality which he represents. For this purpose, not less than twenty-five percent (25%) of the number who actually voted in the state or in the county, district, or municipality which he represents, at the election in which he was elected, shall file their petition, in the manner herein provided, demanding his recall by the people. . . . Such additional legislation as may aid the operation of this section shall be provided by law.

The remaining text of Article 2, Section 9 is set out below.[1] In summary, it directs that the recall petition explain, in fewer than

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[1]The balance of Article 2, Section 9 reads:

> They shall set forth in said petition, in not exceeding two hundred (200) words, the reasons why said recall is demanded. If he shall offer his resignation, it shall be accepted and take effect on the day it is offered, and the vacancy thereby caused shall be filled in the manner provided by law. If he shall not resign within five (5) days after the petition is filed, a special election shall be ordered to be held within thirty (30) days after the issuance of the call therefor, in the state, or county, district, or munici-

200 words, why recall is demanded; that, if the petition qualifies, a special election must be called; and that other candidates may be nominated for the special election, with the candidate who receives the most votes to finish the term.

In interpreting Article 2, Section 9, we, like the United States Supreme Court, ''are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' '' *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). ''[W]hen a constitutional provision's language is clear on its face, we will not go beyond that language in determining the voters' intent.'' *Secretary of State v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008). Conversely, ''[i]f a constitutional provision's language is ambiguous, meaning that it is susceptible to 'two or more reasonable but inconsistent interpretations,' we may look to the provision's history, public policy, and reason to determine what the voters intended.'' *Id.* (footnote omitted) (quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998)).

The goal of constitutional interpretation is ''to determine the public understanding of a legal text'' leading up to and ''in the period after its enactment or ratification.'' 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed. 2008 & Supp. 2010). Not all legislative history is created equal. While ''[c]ontemporary construction of the Constitution is very relevant,'' *id.*, and ''legislation enacted immediately following the

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pality electing said officer, to determine whether the people will recall said officer. On the ballot at said election shall be printed verbatim as set forth in the recall petition, the reasons for demanding the recall of said officer, and in not more than two hundred (200) words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall be finally declared. Other candidates for the office may be nominated to be voted for at said special election. The candidate who shall receive highest number of votes at said special election shall be deemed elected for the remainder of the term, whether it be the person against whom the recall petition was filed, or another. The recall petition shall be filed with the officer with whom the petition for nomination to such office shall be filed, and the same officer shall order the special election when it is required. No such petition shall be circulated or filed against any officer until he has actually held his office six (6) months, save and except that it may be filed against a senator or assemblyman in the legislature at any time after ten (10) days from the beginning of the first session after his election. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected, unless such further petitioners shall pay into the public treasury from which the expenses of said special election have been paid, the whole amount paid out of said public treasury as expenses for the preceding special election.

. . . adoption of an amendment [is given great weight] in determining the scope of a constitutional provision,'' *id.* § 23.34, later statutes ''inconsistent with the Constitution [cannot] furnish a construction that the Constitution does not warrant.'' *Id.* § 23.33.

B.

[Headnote 4]

We confront two very different interpretations of Article 2, Section 9 in this case. Both concentrate on the phrase ''not less than twenty-five percent (25%) of the number who actually voted'' but each picks different words to emphasize. The first interpretation favors Strickland and Chandler and has the support of the Secretary of State and Attorney General. This interpretation takes the phrase ''who actually voted'' as determinative and holds that only those who voted in the election that seated the public officer can qualify a petition to recall that officer. The second interpretation, for which respondents contend, won in the district court and carried in the 2009 Legislature. This interpretation sees the word ''number'' as purely quantitative and takes it as settling matters in favor of allowing the signature of any registered voter to qualify a recall petition.

It is a mistake to divorce the debate over the meaning of words from their context. A recall election allows registered voters to remove elected officers from public office ahead of the next regularly scheduled election. Once a recall election is called, all registered voters can vote in it. Thus, the first sentence of Article 2, Section 9 declares: ''Every public officer . . . is subject, as herein provided, to recall from office by the registered voters.''

[Headnotes 5, 6]

However, there is a seemingly deliberate change in terminology between the first and second sentences in Article 2, Section 9. The second sentence concerns who can petition for a recall election and states: ''For this purpose, not less than . . . 25% of the number who actually voted . . . at the election in which [the public officer] was elected, shall file their petition . . . demanding his recall by the people.'' As the Attorney General cogently reasons, ''[t]he change in terminology from 'registered voters' in the first sentence to '25% of the number who actually voted' in the second sentence indicates a limitation on who can sign the petition demanding a recall election, *i.e.*, registered voters who actually cast ballots in the specific election.'' This limitation makes sense. A recall election involves a ''do-over'' of an already-concluded election ahead of the next-scheduled election. As a parliamentary matter, it is not unreasonable to limit the beginning, petition-stage part of the recall process to those who turned out to vote the first time around. Then, if the petition qualifies and a special election gets

set, all registered voters participate in deciding whether to retain or replace the targeted official.

The parties direct us to dictionary definitions of the words ''number'' and ''actually.'' ''Number'' means ''quantity'' and ''total'' but it also means ''collection or company.'' *Webster's New Universal Unabridged Dictionary* 1330 (2d ed. 1996). If taken to mean ''quantity'' or ''total,'' the use of the word ''number'' in Article 2, Section 9 favors respondents. Read to mean ''collection or company,'' however, ''number'' suggests a group of individuals with individual characteristics and is consistent with the meaning advanced by Strickland and Chandler. The use of the personal relative pronoun ''who'' to introduce the clause immediately following ''number'' suggests the latter. *See* George O. Curme, *A Grammar of the English Language: Syntax* 224 (1931) (''It is the tendency to express the idea of personality by the use of *who* and the idea of lack of life or personality by the use of *which*.''); *id.* at 210 (''The usual relatives were *that* and *which*; but after *who* had acquired definite force it rapidly came into favor, for it had a great advantage over its competition—it referred only to persons—hence for reference to persons it was a clearer form.'').

''Actually'' means ''as an actual or existing fact; really.'' *Webster's*, *supra*, at 21. Thus, literally adhering to the provision's words, the signer must have ''as an actual or existing fact; really'' voted at the election in which the position was filled. As an adverb, ''actually'' may not add very much to the verb ''voted.'' Still, as the debate in this case illustrates, the word ''actually'' does vivify the personal ''who'' by which the phrase ''actually voted'' is introduced, personalizing ''number'' as something more than just abstract quantity; it also adds emphasis to ''voted.'' This ''may not be very heavy work for the [word 'actually'] to perform, but a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading.'' *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000). And, as respondents conceded at oral argument, their reading of Article 2, Section 9 leaves ''actually'' with no job at all, which our rules do not allow. *Youngs v. Hall*, 9 Nev. 212, 222 (1874) (''In expounding a constitutional provision such construction should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant.'').

Text alone, in sum, favors Strickland and Chandler.

C.

Granting for argument's sake that Article 2, Section 9 is reasonably susceptible to two interpretations and so ambiguous—though that seems generous—we look beyond text to relevant history.

Article 2, Section 9 was added to the Nevada Constitution in 1912. *See* 1911 Nev. Stat., file no. 4, at 448. It has since been amended twice: first in 1970; and again in 1996. *See* 1969 Nev. Stat., file no. 43, at 1663; 1995 Nev. Stat., file no. 25, at 2888.

Originally, Article 2, Section 9 did not mention ''number'' or ''actually.'' The first sentence read much like it does today, except ''qualified electors'' stood in for ''registered voters.'' However, the second sentence was different and said:

> For this purpose [recall] not less than twenty-five per cent (25%) of the qualified electors who vote in the state or in the county, district, or municipality electing said officer, at the preceding election, for justice of the supreme court, shall file their petition, in the manner herein provided, demanding his recall by the people.

1911 Nev. Stat., file no. 4, at 448.

Minus ''actually'' and with the baseline a potentially unrelated general election ''for justice of the supreme court,'' the case for using the number purely quantitatively—as the end result of multiplying the defined base number by .25, nothing more—seems reasonable. But this was not the contemporaneous interpretation. From day one, both the Legislature and the judiciary viewed even the original version of Article 2, Section 9 as imposing both qualitative and quantitative restrictions on who could qualify a recall petition—limiting the petition prerogative to electors who had turned out and voted in the earlier relevant election.

State v. Scott, 52 Nev. 216, 285 P. 511 (1930), analyzes the original version of Article 2, Section 9 and its companion legislation in detail. ''Pursuant to [the newly ratified Article 2, Section 9], the [1913] legislature passed an act [1913 Nev. Stat., ch. 258, §§ 1-11, at 400-01] consisting of eleven sections providing for the recall of public officers.'' *Scott*, 52 Nev. at 225, 285 P. at 513. Section 2 of the 1913 act, which *Scott* reprints in full, said unmistakably that qualifying a recall petition took signatures from those who had voted in the relevant baseline election:

> For the purpose of recalling any public officer there shall be first filed . . . a petition, signed by the qualified electors who voted in the state, or in the county, district or municipality electing such officer, equal in number to twenty-five per cent of the votes cast in said state, or in the county, district or municipality for the office of justice of the supreme court, at the last preceding election.

Id. *Scott* goes on to state that these provisions in the contemporaneously enacted statute, ''[e]xcept in some minor details, . . . are the same as the provisions of said section 9, article 2, of the

[C]onstitution.'' *Id.* at 226, 285 P. at 513. *Accord Batchelor v. District Court*, 81 Nev. 629, 631-32, 408 P.2d 239, 240 (1965) (''we read the constitutional language to require the recall petition to be signed by not less than 25 percent of the qualified electors of [(coincidentally)] Boulder City who voted at the last general election for a Supreme Court justice''; again stating that the updated version of the companion statute considered in *Scott*, while it ''strays somewhat from the constitutional language . . . does not carry a different meaning nor impose a different requirement'' than Article 2, Section 9).

In 1970, the voters ratified the first amendment to Article 2, Section 9. 1969 Nev. Stat., file no. 43, at 1663. ''Qualified electors'' was replaced with ''registered voters,'' and ''actually'' and ''number'' made their debut. *Id.* The reference to the election ''for justice of supreme court'' was eliminated and replaced by ''general'' election. *Id.* As revised, the second sentence of Article 2, Section 9 read:

> For this purpose [recall], a number of registered voters not less than twenty-five per cent (25%) of the number who actually voted in the state or in the county, district, or municipality electing said officer, at the preceding general election, shall file their petition, in the manner herein provided, demanding his recall by the people.

Id.

[Headnote 7]

If by the introduction of the word ''number'' the 1970 voters intended to eliminate the rule that only those who exercised their right to vote in the relevant baseline election can qualify a recall petition, you would expect a direct statement and express language to that effect, given *Scott* and the law it discussed as settled. *See* 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 58:3, at 114-15 (7th ed. 2008) (''where a[later] act purports to overturn long-standing legal precedent and completely change the construction placed on a statute by the courts,[2] it is not too much to require that it be done in unmistakable language'' (quoting *State ex rel. Housing Auth. of Plant City v. Kirk*, 231 So. 2d 522 (Fla. 1970))). No such statement was made. Instead, along with the word ''number'' came the word ''actually'' and the phrase ''who actually voted''—signifying that the requirement that a qualifying recall petition be signed by voters who voted in the relevant election would remain and certainly not suggesting it would be scrapped.

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[2]Rules of statutory construction apply to constitutional interpretation. *Burk*, 124 Nev. at 590 n.32, 188 P.3d at 1120 n.32.

The question put to the voters who ratified Article 2, Section 9's amendment in 1970 confirms our reading. It asked point-blank: ''Shall [Article 2, Section 9] relating to the recall of public officers'' be amended to ''provid[e] that the number of petitioners required to recall public officers be not less than 25 percent of the registered voters who actually voted at the last general election?'' Constitutional Amendments and Other Propositions to be Voted Upon in State of Nevada at General Election, November 3, 1970, Question No. 2 (available at Nevada Legislative Counsel Bureau Research Library).[3] Thus phrased, the ballot question passed on a popular vote of 62,460 to 50,545. *Id.*

And if, despite all this, any niggling doubt remained as to what ''number who actually voted'' signified, it was laid to rest in *Foley v. Kennedy*, 110 Nev. 1295, 885 P.2d 583 (1994):

> According to the referenced constitutional provision, twenty-five percent of the persons who actually voted in the relevant political division in the preceding general election shall file their petition for recall. Thus, twenty-five percent of the persons who voted in the general election preceding the filing of the petition must sign the recall petition.

Id. at 1299, 885 P.2d at 585 (dictum).

The 1996 amendments changed the relevant baseline election from the ''preceding general election'' to ''the election in which [the officer] was elected,'' 1995 Nev. Stat., file no. 25, at 2888, but not the requirement that a qualifying recall petition be signed by people who voted in the relevant election, comprising 25 percent of the turnout for that election.

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[3]The 1970 amendment changed the baseline election, not the requirement that the signer have voted in the baseline election, however defined. We note that the explanation accompanying the ballot question specified that a ''yes'' vote would:

> chang[e] the number and qualifications of petitioners required to recall public officers from not less than 25 percent of the qualified electors who vote in the preceding election in the state, county, district or municipality electing the officer in question to not less than 25 percent of the registered voters who actually voted at the last general election.

The reference to the preceding local election is puzzling given that the existing version of Article 2, Section 9, as interpreted in both *Scott* and *Batchelor*, calculated the signers as 25 percent of those who had voted in the most recent local election at which a supreme court justice was on the ballot. The reference appears to be to the challenge the court rejected in *Batchelor*, where it was argued the percentage needed to come from those who had voted in the officer's election. *See Batchelor*, 81 Nev. at 631-32, 408 P.2d at 240. While the history of Article 2, Section 9 shows shifts as to which past election should be the baseline for the 25-percent calculation, the commitment to limiting the petition prerogative to those who actually voted in the relevant baseline election has been unwavering.

The history of Article 2, Section 9 (before the 2009 Legislature's passage of S.B. 156, more on which below) thus leads to the same conclusion as our exegesis of its text: While all registered voters can vote at a special recall election, only voters who voted at the relevant baseline election can qualify a recall petition, and it takes 25 percent of them for a special election to be called.

D.

[Headnote 8]

This brings us to policy. As respondents note, it is the general ''rule that an act for recall should be liberally construed with a view to promote the purpose for which it was enacted.'' *Scott*, 52 Nev. at 231, 285 P. at 515; *Cleland v. District Court*, 92 Nev. 454, 455-56, 552 P.2d 488, 489 (1976). But what does this mean here? Unlike impeachment, which requires ''misdemeanor or malfeasance in office,'' Nev. Const. art. 7, § 2, recall requires only a statement in the petition of ''the reasons why . . . recall is demanded,'' Nev. Const. art. 2, § 9—the legitimacy of which the voters alone decide.

[Headnote 9]

''Recall is aimed at removing officials who have acted 'corruptly' in the sense that they are no longer representing the people but are serving the interests of a powerful minority,'' Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. Pa. L. Rev. 239, 272 (2004), or who have ''gone back on key promises [such that] the people should be able to make use of the recall process to undo a selection process in which they were effectively sold a false bill of public goods.'' Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 Cal. L. Rev. 927, 946 (2004) (footnote omitted). Nevada adopted its recall provision in 1912, just a year after California did. Cal. Const. art. XXIII, § 1 (1911). In Nevada, as in California, ''there is no evidence to suggest that framers, adopters, and early users of the recall measure saw it as a mechanism to rerun an ordinary election in which there had been no dishonesty and after which there had been no evidence of special interest group capture.'' Amar, *supra*, at 946; 27 *The American Nation: A History* 164 (Albert Bushnell Hart ed., Harper 1918). And, as we have noted, the ''[s]tate has a [particular] interest in 'safeguarding' the recall procedure'' given that ''a recall petition attacks a public official whom the public has already once elected and, if successful, requires a costly special election at the taxpayers' expense.'' *Citizens for Honest Gov't v. Sec. of State*, 116 Nev. 939, 949, 11 P.3d 121, 127 (2000).

Requiring 25 percent of the voters who turned out at the election that put the targeted official in office to qualify a recall petition makes recall more difficult than respondents' interpretation would. However, that does not make the provision suspect or illegitimate. Respondents' interpretation would make a low-turnout election readily subject to a do-over at the behest of those who simply stayed home and didn't bother to vote—especially where, as can occur, an unopposed officer is elected by virtue of a single vote in a primary—with the perverse result that the least controversial elections would be easiest to undo. Allowing citizens who did not vote to call for a do-over arguably disenfranchises those voters who participated in selecting the official. This carries its own risks of ''undermin[ing] an element of representative democracy, namely, regularly scheduled elections which allow for political accountability at regular periods.'' Garrett, *supra*, at 273.

Different states have drawn the recall battle lines differently, depending on how their citizens assess the strength of the competing policies in play. *See* Jay M. Zitter, Annotation, *Sufficiency of Technical and Procedural Aspects of Recall Petitions*, 116 A.L.R.5th 1 (2004). Where Nevadans have drawn the line makes practical sense and deserves respect.

E.

[Headnote 10]

Last, there is S.B. 156. With an effective date of October 1, 2009, this legislation postdates the petitions to recall Strickland and Chandler and so doesn't directly apply to them. *See Burk*, 124 Nev. at 592, 188 P.3d at 1121 (statutes normally do not apply retroactively to acts completed before their effective date). Nonetheless, respondents urge that we must read Article 2, Section 9 their way to avoid putting the Constitution at odds with the newly enacted provisions of NRS 306.020(2). This argument has matters backward. ''The constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes must be construed consistent with the constitution,'' *Foley*, 110 Nev. at 1300, 885 P.2d at 586—and rejected if inconsistent therewith. *See* 6 Rotunda & Nowak, *Treatise on Constitutional Law*, *supra*, § 23.33. Accepting respondents' position ''would require the untenable ruling that constitutional provisions are to be interpreted so as to be in harmony with the statutes enacted pursuant thereto; or that the constitution is presumed to be legal and will be upheld unless in conflict with the provisions of a statute.'' *Foley*, 110 Nev. at 1300-01, 885 P.2d at 586.

Nor does S.B. 156 gain sway in this case by reason of the final sentence of Article 2, Section 9, which states: ''Such additional

legislation as may aid the operation of this section shall be provided by law.'' This sentence licenses legislation that '' 'aid[s] the operation' of the recall right'' provided in Article 2, Section 9, *Citizens for Honest Gov't*, 116 Nev. at 947, 11 P.3d at 126 (quoting Nev. Const. art. 2, § 9), not law that changes the constitution's substantive terms without submitting the constitutional change to popular vote. *See We the People Nevada v. Secretary of State*, 124 Nev. 874, 886-87, 192 P.3d 1166, 1174-75 (2008).

III.

[Headnotes 11-14]

Respondents assert that our reading of Article 2, Section 9 abridges the voters' ''fundamental right to have access to the ballot.'' This conflates the right to submit a petition calling for recall with the right to vote at the special election that follows, which are two different things. A special election called as a result of a qualifying recall petition is open to all registered voters on equal terms. As to the initiating petition itself, the state has an '' 'important' [interest in] promot[ing] the efficient regulation of recall petitions so that 'some sort of order, rather than chaos' accompanies the process'' and so that ''a costly special election at the taxpayers' expense'' ahead of the next-scheduled election is not called except as provided in the state constitution. *Citizens for Honest Gov't*, 116 Nev. at 947, 949, 11 P.3d at 126, 127 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Differentiating between who can initiate a recall petition and who can vote at the special election that follows the filing of a qualified recall petition does not offend the Fourteenth Amendment. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (''there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order . . . is to accompany the democratic processes'').

For these reasons we REVERSE.

PARRAGUIRRE, C.J., and HARDESTY, DOUGLAS, CHERRY, SAITTA, and GIBBONS, JJ., concur.

TERESA BAHENA, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR EVERTINA M. TRUJILLO TAPIA, DECEASED; MARIANA BAHENA, INDIVIDUALLY; MERCEDES BAHENA, INDIVIDUALLY; MARIA ROCIO PERREYA, INDIVIDUALLY; MARIA LOURDES BAHENA-MEZA, INDIVIDUALLY; MARICELA BAHENA, INDIVIDUALLY; ERNESTO TORRES AND LEONOR TORRES, INDIVIDUALLY, AND LEONOR TORRES, AS SPECIAL ADMINISTRATOR FOR ANDRES TORRES, DECEASED; LEONOR TORRES FOR ARMANDO TORRES AND CRYSTAL TORRES, MINORS, REPRESENTED AS THEIR GUARDIAN AD LITEM; VICTORIA CAMPE, AS SPECIAL ADMINISTRATOR OF FRANK ENRIQUEZ, DECEASED; PATRICIA JAYNE MENDEZ, FOR JOSEPH ENRIQUEZ, JEREMY ENRIQUEZ, AND JAMIE ENRIQUEZ, MINORS, REPRESENTED AS THEIR GUARDIAN AD LITEM; AND MARIA ARRIAGA FOR KOJI ARRIAGA, REPRESENTED AS HIS GUARDIAN AD LITEM, APPELLANTS/CROSS-RESPONDENTS, *v*. GOODYEAR TIRE & RUBBER COMPANY, RESPONDENT/CROSS-APPELLANT.

No. 49207

July 1, 2010 235 P.3d 592

Appeal and cross-appeal from a district court judgment in a wrongful death action. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Wrongful death/products liability action was brought against tire manufacturer by and on behalf of motorist and passengers killed and injured in single-vehicle rollover accident. After striking manufacturer's answer as to liability as a discovery sanction, the district court entered judgment on a jury verdict awarding plaintiffs compensatory but not punitive damages. Manufacturer appealed, and plaintiffs cross-appealed. The supreme court, GIBBONS, J., held that: (1) district court did not abuse its discretion by striking as a discovery sanction tire manufacturer's answer as to liability, (2) district court did not abuse its discretion by the way it structured hearing on discovery sanctions, (3) compensatory damages award in excess of $30 million was not excessive, and (4) district court did not abuse its discretion by requiring plaintiffs to establish liability for punitive damages.

Affirmed.

[Rehearing denied December 30, 2010]

PICKERING, J., dissented.

Albert D. Massi, Ltd., and *Albert D. Massi*, Las Vegas, for Appellants/Cross-Respondents Arriagas, Campe, Mendez, and Torres.

Callister & Reynolds and *Matthew Q. Callister* and *R. Duane Frizell*, Las Vegas, for Appellants/Cross-Respondents Bahena, Bahena-Meza, and Perreya.

Lewis & Roca, LLP, and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas, for Respondent/Cross-Appellant Goodyear Tire & Rubber Company.

1. APPEAL AND ERROR.
   In reviewing sanctions, the supreme court does not consider whether the court, as an original matter, would have imposed the sanctions; the standard of review is whether the district court abused its discretion in doing so.
2. APPEAL AND ERROR.
   Supreme court would not impose a somewhat heightened standard of review, when determining whether trial court abused its discretion by imposing discovery sanctions on tire manufacturer in products liability action, when the sanctions did not result in the case concluding sanctions of striking manufacturer's answer both as to liability and damages, but instead struck manufacturer's answer as to liability only. NRCP 37.
3. PRETRIAL PROCEDURE.
   District court did not abuse its discretion by imposing non-case concluding sanctions against tire manufacturer, in products liability action brought on behalf of motorists and passengers injured and killed in single-vehicle rollover accident, for violating ruling issued by discovery commissioner requiring manufacturer to produce a deposition witness to testify as to the authenticity of approximately 74,000 documents produced by manufacturer in response to plaintiffs' discovery requests; manufacturer was required to comply with commissioner's ruling unless manufacturer sought a stay pending review by the district court, manufacturer did not request the commissioner to stay the ruling pending review, and district court subsequently overruled manufacturer's objections to commissioner's ruling. NRCP 16.3(b), 37(b)(2), 37(d); EDCR 2.34(e).
4. PRETRIAL PROCEDURE.
   District court did not abuse its discretion under its inherent equitable power by striking as a discovery sanction tire manufacturer's answer as to liability only, in products liability action brought on behalf of motorists and passengers injured and killed in single-vehicle rollover accident, after manufacturer failed to comply with ruling issued by discovery commissioner requiring manufacturer to produce a deposition witness to testify as to the authenticity of approximately 74,000 documents produced by manufacturer, as manufacturer not only violated commissioner's ruling, but district court also found that manufacturer filed answers to plaintiffs' interrogatories that contained improper responses and lacked proper verifications, and substantial evidence supported district court's findings. NRCP 37(b)(2)(C), 37(d).
5. PRETRIAL PROCEDURE.
   Non-case concluding discovery sanctions do not have to be preceded by other less severe sanctions. NRCP 37(b)(2)(C), 37(d).
6. PRETRIAL PROCEDURE.
   District court did not abuse its discretion by the way it structured hearing, on motion for discovery sanctions against tire manufacturer in products liability action brought on behalf of motorist and passengers killed and injured in single-vehicle rollover accident, though district court

did not provide manufacturer with a full evidentiary hearing, as motion did not result in a case-concluding sanction but instead resulted in the dismissal of manufacturer's answer as to liability only, district court allowed the attorneys for the parties to make factual representations regarding the various discovery issues in dispute, and district court considered affidavits and exhibits regarding discovery commissioner's orders and manufacturer's objections to such orders. NRCP 37(b)(2)(C), 37(d).

7. PRETRIAL PROCEDURE.
When a district court does not impose the ultimate discovery sanctions of dismissal of a complaint with prejudice or striking an answer as to liability and damages, the court should, at its discretion, hold such hearing as it reasonably deems necessary to consider matters that are pertinent to the imposition of appropriate sanctions.

8. PRETRIAL PROCEDURE.
When a district court does not impose the ultimate discovery sanctions of dismissal of a complaint with prejudice or striking an answer as to liability and damages, the length and nature of the hearing for non-case concluding sanctions shall be left to the sound discretion of the district court; in determining the nature of this hearing, the district court should ensure that there is sufficient information presented to support the sanctions ordered, and the district court should make such findings as necessary to support its conclusions of the factors set forth in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990).

9. DAMAGES; DEATH.
Compensatory damages award in excess of $30 million to plaintiffs was not excessive, in wrongful death/products liability action brought against tire manufacturer on behalf of motorist and passengers killed and injured in single-vehicle rollover accident that occurred when tire separated from the vehicle; three people were killed in the accident, seven other passengers suffered injuries, injuries were serious, and one passenger suffered a closed head injury that caused a persistent vegetative state.

10. APPEAL AND ERROR.
When reviewing a damages award, the supreme court assumes that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor.

11. PRETRIAL PROCEDURE.
District court did not abuse its discretion by allowing tire manufacturer to contest punitive damages and requiring plaintiffs to establish liability for punitive damages, after district court struck manufacturer's answer as to liability as a discovery sanction, in wrongful death/products liability action brought against tire manufacturer on behalf of motorist and passengers killed and injured in single-vehicle rollover accident; district court had the discretion to determine what degree manufacturer was entitled to participate in the trial after striking answer as to liability.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this appeal we consider whether the district court abused its discretion when it struck a defendant's answer, as to liability only, as a discovery sanction pursuant to NRCP 37(b)(2)(C) and

NRCP 37(d). We conclude that the district court did not abuse its discretion by imposing non-case concluding sanctions and by not holding a full evidentiary hearing. We further conclude that the district court exercised its inherent equitable power and properly applied the factors set forth in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92-93, 787 P.2d 777, 780 (1990). We therefore affirm the judgment of the district court.

FACTS AND PROCEDURAL HISTORY

This case arises out of a single-vehicle, multiple rollover accident sustained by the appellants/cross-respondents (collectively, Bahena) that occurred when the left rear Goodyear tire separated from the vehicle.

The appellants were family members and friends. Three people were killed in the accident. Seven other passengers suffered injuries. A teenage boy suffered a closed head injury that caused a persistent vegetative state. Bahena sued respondent/cross-appellant Goodyear Tire and Rubber Company for wrongful death and other tort claims arising from the accident. Although the district court precluded Goodyear from litigating the issue of liability, the district court permitted Goodyear to fully litigate, without any restrictions, all claims by Bahena for compensatory and punitive damages.

The district court set the trial date for January 29, 2007. The discovery cutoff was December 15, 2006.

On November 28, 2006, Bahena filed a second motion to compel for sanctions seeking better responses to interrogatories and to require an index matching the discovery documents. The motion to compel pertained to interrogatory answers and a mass production of documents Goodyear had previously produced. At the hearing before the discovery commissioner on December 5, 2006, the discovery commissioner made a written finding of fact that he did not believe that Goodyear was acting in good faith and that Goodyear must designate which Rule 34 request made by Bahena the specific documents produced were responding to; otherwise, Goodyear was being evasive and noncompliant with discovery. The discovery commissioner's findings and recommendations were not objected to and subsequently approved by the district court when it entered an order on January 5, 2007.

The next discovery dispute pertained to a deposition noticed by Bahena of a Goodyear representative for December 11, 2006. Goodyear moved for a protective order on December 8, 2006. The discovery commissioner held a hearing upon the motion for protective order on December 14, 2006. The commissioner ruled that the deposition should go forward and recommended in writing on December 20, 2006, as follows:

> IT IS RECOMMENDED THAT prior to December 28, 2006, Goodyear will have a representative appear at the office of Plaintiffs' counsel in Las Vegas, Nevada to render testimony in the presence of a court reporter regarding the authenticity of the approximately 74,000 documents bates stamped GY-Bahena produced by Goodyear in this matter. Any document Goodyear's representative does not either affirm or deny as authentic will be deemed authentic.

These recommendations were served on Goodyear on December 21, 2006. Goodyear did not request the discovery commissioner to stay the deposition prior to December 28, 2006. In addition, Goodyear did not file its objections to the discovery commissioner's recommendations until January 3, 2007.[1] On January 5, 2007, the district court entered its order approving the discovery commissioner's recommendations retroactive to the December 14, 2006, hearing date. Goodyear had filed a timely objection to the discovery commissioner's recommendations on January 3, 2007. However, the district court did not receive the objections prior to entering its order on January 5, 2007.

Bahena filed a motion for sanctions on December 29, 2006. This motion was based upon Goodyear's unverified interrogatory responses and boilerplate or proprietary and trade-secret objections.[2] In this motion, Bahena sought additional relief, including the striking of Goodyear's answer and the entry of judgment as to both liability and damages. At a hearing upon this motion held January 9, 2007, the district court also considered and overruled Goodyear's objections to the recommendations and sustained its January 5, 2007, order regarding producing a witness for deposition to authenticate the documents as verbally ruled by the discovery commissioner on December 14, 2006. The district court struck Goodyear's answer as to liability and damages for sanctions based upon discovery abuses.

After the January 9, 2007, hearing, Bahena filed a motion to establish all its damages by way of a prove-up hearing. Goodyear filed an opposition to this motion and a countermotion for reconsideration of all the discovery sanctions approved by the district court, pursuant to its January 5, 2007, approval of the discovery commissioner's recommendations for the December 14, 2006,

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[1]Goodyear's objections filed January 3, 2007, to the December 20, 2006, recommendations included an objection to the self-executing sanctions of deeming the documents authentic. This same objection continued in pleadings filed by Goodyear January 8, 2007, January 17, 2007, and through a hearing held on January 18, 2007, discussed below.

[2]On December 13, 2006, Goodyear answered all 34 interrogatories propounded by Bahena with objections. Further, Goodyear did not verify these answers. As previously noted, the discovery cutoff date was December 15, 2006.

hearing, and its January 9, 2007, order granting the motion to strike Goodyear's answer as to liability and damages. The district court set a hearing for these motions, pursuant to an order shortening time, for January 18, 2007. During the hearing, the district court granted Goodyear's request for reconsideration of its January 9, 2007, ruling to strike Goodyear's answer as to both liability and damages and entertained further argument on these issues. The district court further proceeded to accept factual representations made by all of the parties' attorneys present in court on behalf of Bahena and Goodyear, as officers of the court. At this hearing, which consisted of 64 pages of transcript, the district court questioned the attorneys regarding the nature of the discovery disputes and the various responses. The district court further considered the voluminous exhibits and affidavits of counsel for the parties that were attached to the various motions and countermotions filed by Bahena and Goodyear. The district court imposed reduced sanctions of striking Goodyear's answer as to liability only, and denied Bahena's request to establish its damages by way of a prove-up hearing.

In analyzing its decision for imposing these non-case concluding sanctions, the district court reasoned that Goodyear's conduct throughout the discovery process caused stalling and unnecessary delays. The district court stated that the repeated discovery delays attributed to Goodyear were such that continuing the trial date to allow discovery to be completed was not the appropriate remedy for Bahena since the prejudice was extreme and inappropriate. The district court noted that the Bahena plaintiffs included a 14-year-old who had been in a persistent vegetative state for the past two years together with the estates of three dead plaintiffs. The district court further held that since the trial was scheduled to commence January 29, 2007, Goodyear knew full well that not responding to discovery in good faith would require the trial date to be vacated. If the trial had proceeded, there could have been an open question as to the authenticity of approximately 74,000 documents that were the subject of the December 14, 2006, hearing before the discovery commissioner. The district court then analyzed and applied the factors to be considered in the imposition of discovery sanctions set forth in *Young v. Johnny Ribeiro Building*, and codified findings of fact and conclusions of law in a written order filed January 29, 2007.[3] The case then proceeded to jury trial on the issue of damages only and Bahena obtained a judgment in excess of $30 million in compensatory damages. However,

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[3]The district court invited both Bahena and Goodyear to submit proposed findings of fact and conclusions of law to the district court. However, the district court rejected the proposed findings and conclusions submitted by Bahena and Goodyear, and crafted its own findings of fact and conclusions of law.

Goodyear received a defense verdict upon Bahena's claim for punitive damages.

DISCUSSION

[Headnotes 1, 2]

In reviewing sanctions, we do not consider whether we, as an original matter, would have imposed the sanctions. Our standard of review is whether the district court abused its discretion in doing so. *Foster v. Dingwall*, 126 Nev. 56, 227 P.3d 1042 (2010). However, we do not impose a somewhat heightened standard of review because the sanctions in this case did not result in the case concluding sanctions of striking Goodyear's answer both as to liability and damages. In *Clark County School District v. Richardson Construction*, we concluded that:

> Under NRCP 37(b)(2), a district court has discretion to sanction a party for its failure to comply with a discovery order, which includes document production under NRCP 16.1. We will set aside a sanction order only upon an abuse of that discretion.

123 Nev. 382, 391, 168 P.3d 87, 93 (2007). We further concluded that there was substantial evidence to support the district court's decision to sanction the Clark County School District by striking all of its affirmative defenses. *Id*. In its analysis, the district court weighed the factors to impose the appropriate sanctions against the Clark County School District. *Id*. at 391-92, 168 P.3d at 93. Non-case concluding sanctions could have included striking the school district's answer as to liability only, as well as striking all of its affirmative defenses. The district court chose the latter. *Id*. For these reasons, we conclude that the same standard of review for striking all of the defendant's affirmative defenses applies when the district court strikes a defendant's answer as to liability only, but does not conclude the case as to damages.[4]

NRCP 37(b)(2) sanctions

[Headnote 3]

Bahena contends that Goodyear violated the discovery order to produce a witness for deposition prior to December 28, 2006. We agree.

NRCP 37(b)(2) provides, in part, that if a person designated by a party to testify ''fails to obey an order to provide or permit

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[4]Our dissenting colleague suggests we adopt a standard of review for discovery sanctions based upon a parallel line of federal authority. We disagree because there is ample Nevada case authority regarding discovery sanctions. Also, we have expressly rejected the adoption of federal authority that employs

discovery . . . , the court in which the action is pending may make such orders in regard to the failure as are just,'' and, among other things, enter the following sanctions:

> An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

NRCP 37(b)(2)(C). In this case, the discovery commissioner made a ruling at a hearing on December 14, 2006, that Goodyear must produce a witness for deposition to testify as to the authenticity of voluminous documents prior to December 28, 2006. Goodyear did not request the discovery commissioner stay this ruling pursuant to EDCR 2.34(e), the local district court rule that would allow such a stay. Thereafter, the time to produce the witness for deposition passed. On January 3, 2007, Goodyear filed objections to the discovery commissioner's written report and recommendations dated December 20, 2006, requiring the deposition. The district court initially approved the discovery commissioner's recommendations by an order dated January 5, 2007. Since the district court did not receive a copy of the objections filed by Goodyear on January 3, 2007, the district court allowed Goodyear to argue its objections at a hearing held January 9, 2007. The district court again overruled Goodyear's objections at the conclusion of this hearing.[5]

Goodyear was required to comply with the discovery commissioner's ruling announced at the December 14 hearing, unless the ruling was overruled by the district court. *See* NRCP 16.3(b) (stating that the discovery commissioner has the authority ''to do all acts and take all measures necessary or proper for the efficient performance of his duties''). A ruling by the discovery commissioner is effective and must be complied with for discovery purposes once it is made, orally or written, unless the party seeks a stay of the ruling pending review by the district court. *Id.*; EDCR 2.34(e). Goodyear failed to seek a stay of the ruling or an expedited review by the district court prior to the time to comply with the ruling,

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mechanical application of factors regarding qualifications of expert witnesses and that conflicts with our state law. *Higgs v. State*, 126 Nev. 1, 16, 222 P.3d 648, 657-58 (2010).

[5]After the discovery commissioner's report and recommendations are signed and objected to, the district court has the option of affirming and adopting the recommendations without a hearing, modifying or overruling the recommendations without a hearing, or setting a date and time for a hearing upon the objections filed. NRCP 16.1(d)(3). If the recommendations are affirmed and adopted, the order of the district court is effective retroactive to the date of the hearing before the discovery commissioner when the ruling is verbally made. EDCR 2.34(e) permits the discovery commissioner to stay the ruling pending review by the district court.

and was therefore required to comply with the discovery commissioner's directive. The failure to do so was tantamount to a violation of a discovery order as it relates to NRCP 37(b)(2). *Young*, 106 Nev. at 92, 787 P.2d at 779 (holding that a court's oral ruling was sufficient to ''constitute an order to provide or permit discovery under NRCP 37(b)(2)'').

In *Young*, ''[t]he court sanctioned Young by ordering him to pay [the nonoffending party's] costs and fees on the motion to dismiss, *by dismissing Young's entire complaint with prejudice, and by adopting the final accounting proposed by* [*the nonoffending party*] *as a form of default judgment against Young*'' even though Young argued ''that [the nonoffending party's] accounting was factually insufficient to constitute a default judgment.'' 106 Nev. at 91, 787 P.2d at 778 (emphasis added). We disagreed with Young and affirmed the judgment of the district court in all respects since Young ''forfeited his right to object to all but the most patent and fundamental defects in the accounting.''[6] *Id*. at 95, 787 P.2d at 781.

After the hearing on January 9, 2007, Bahena filed a motion to allow damages to be established by way of a prove-up hearing. Goodyear filed an opposition to this motion and a countermotion for reconsideration regarding the discovery sanction issues as to the interrogatory answers, the discovery commissioner's report and recommendations regarding the deposition and self-executing authentication sanctions, and the order striking Goodyear's answer. The district court granted Goodyear's request for reconsideration and reopened argument upon the issue of appropriate sanctions for these discovery abuses. At the hearing on January 18, 2007, the district court discussed the discovery commissioner's recommendations regarding producing a witness for deposition and observed as follows:

> I would have overruled your objections because the recommendation is very clear on its face. There is no confusion. It says what it says. And all you have to do is read it and comply with it.

The district court then proceeded to review the history of discovery abuses in this case involving Goodyear not only as to Bahena, but as to the codefendant Garm Investments, Inc. We conclude the

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[6]We further noted that damages in a prove-up must normally be established by substantial evidence. *Young*, 106 Nev. at 94, 787 P.2d at 781. However, in cases involving a default judgment as a discovery sanction, the nonoffending party has a somewhat lesser standard of proof and only needs to establish a prima facie case by substantial evidence. *Id.*; *Foster v. Dingwall*, 126 Nev. 56, 67, 227 P.3d 1042, 1049 (2010). Therefore, Ribeiro only had to establish a prima facie accounting.

district court did not abuse its discretion by imposing non-case concluding sanctions upon Goodyear pursuant to NRCP 37(b)(2).

Inherent equitable power of the district court

In *Young*, we held that courts have ''inherent equitable powers to dismiss actions or enter default judgments for . . . abusive litigation practices. Litigants and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute.'' 106 Nev. at 92, 787 P.2d at 779 (alteration in original) (internal quotation and citation omitted). We further concluded that ''while dismissal need not be preceded by other less severe sanctions, it should be imposed only after thoughtful consideration of all the factors involved in a particular case.'' *Id*. at 92, 787 P.2d at 780. In discussing the legal basis for dismissal, we held:

> that every order of dismissal with prejudice as a discovery sanction be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors. The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring the adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Id. at 93, 787 P.2d at 780.

After analyzing all of these factors, we held ''that the district court did not abuse its discretion in imposing the more severe sanctions *of dismissal and entry of default judgment*'' and that the sanctions were not ''manifestly unjust.'' *Id*. (emphasis added). We stated that ''the district court gave appropriately careful, correct and express consideration to most of the factors discussed above'' and that we have ''affirmed sanctions of dismissal and entry of default judgment based on discovery abuses even less serious than Young's.'' *Id*. at 93-94, 787 P.2d at 780.

[Headnote 4]

As the district court did in *Young*, the district court here prepared nine pages of carefully written findings of fact and conclusions of law analyzing the *Young* factors. These findings of fact de-

tail Goodyear's discovery abuses not only as to the violation of the court order to produce a witness for deposition, but as to improper responses and verifications to answers to interrogatories. For example, the district court found that ''Goodyear failed to produce any representative in Nevada by December 28, 2006 pursuant to this [c]ourt's order from the December 14, 2006 hearing.'' Another finding of fact provided, in part, that if ''the [c]ourt had been made aware of Goodyear's objection to the [d]iscovery [c]ommissioner's recommendations from the December 14, 2006 hearing, the [c]ourt would have overruled Goodyear's objections because the signed recommendation is very clear on its face.'' The conclusions of law set forth that the degree of willfulness by Goodyear was extreme and itemize nine separate reasons. These conclusions also state that:

> it is clear that Goodyear has taken the approach of stalling, obstructing and objecting. Therefore, the court considers Goodyear's posture in this case to be totally untenable and unjustified. Goodyear's responses to [p]laintiffs' interrogatories are nothing short of appalling.

The conclusions of law further balance various lesser and more severe sanctions and conclude that striking Goodyear's answer as to liability only was the appropriate sanction. The district court additionally awarded monetary sanctions against Goodyear in favor of Bahena and codefendant Garm Investments, Inc., for failure to provide proper answers to interrogatories and verifications.

We would further note that the discovery violations of Goodyear are strikingly similar to those in *Foster v. Dingwall*, 126 Nev. 56, 227 P.3d 1042 (2010). In *Foster*, the district court struck all the pleadings of the appellants and allowed judgment to be entered by default. *Id.* at 63, 227 P.3d at 1047. We concluded that the district court orders sufficiently demonstrated that the conduct of the appellants was ''repetitive, abusive, and recalcitrant.'' *Id.* at 64, 227 P.3d at 1047. We further concluded that the district court ''did not err by striking their pleadings and entering a default judgment against them.'' *Id.* The discovery abuses in *Foster* include the initial failure of a party to appear after depositions were noticed. *Id.* at 61-62, 227 P.3d at 1046. There were also discovery abuses by the failure of the appellants to supplement their responses to their answers to interrogatories and responses to requests for production of documents. *Id.* at 62, 227 P.3d at 1046. We concluded that NRCP 37(b)(2)(C) and NRCP 37(d) provide that a court may strike a party's pleadings if that party fails to attend his own deposition or fails to obey a discovery order. *Id.* at 65, 227 P.3d at 1048. We further concluded that entries of complete default are proper where ''litigants are unresponsive and engaged in abusive litigation practices that cause interminable delays.'' *Id.* We held

that such sanctions ''were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders,'' and that the conduct of the appellants evidenced ''their willful and recalcitrant disregard of the judicial process.'' *Id*. at 66, 227 P.3d at 1049. As to the issue of attorney fees, we concluded that the award of attorney fees, in addition to default sanctions, was proper and the award of attorney fees shall be reviewed under the abuse of discretion standard. *Id*. at 72, 227 P.3d at 1052 (citing *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006)).

Based upon the holdings of *Young*, *Foster*, and *Clark County School District v. Richardson Construction*, and for all of the reasons set forth above, we conclude that substantial evidence supports the non-case concluding sanctions of striking Goodyear's answer as to liability only pursuant to the district court's inherent equitable power. Further, findings of fact shall not be set aside unless they are clearly erroneous and not supported by substantial evidence. *See* NRCP 52(a); *Beverly Enterprises v. Globe Land Corp.*, 90 Nev. 363, 365, 526 P.2d 1179, 1180 (1974). The discovery commissioner's recommendations, from the December 5, 2006, and December 14, 2006, hearings, which the district court affirmed and adopted on January 5, 2007, are the findings of a master. Since the district court adopted them, they shall be considered the findings of the court. NRCP 52(a).

[Headnote 5]

We further conclude that by Goodyear requesting reconsideration of the discovery sanctions due to the failure of Goodyear's representative to appear for a deposition prior to December 28, 2006, and the order of the district court from the January 9, 2007, hearing, the district court had the inherent equitable power to revise the appropriate sanctions in conjunction with the violation of this order and the failure of Goodyear to properly answer and verify the interrogatories.[7] These non-case concluding sanctions do not have to be preceded by other less severe sanctions. *Young*, 106 Nev. at 92, 787 P.2d at 780. The district court did not abuse its discretion by doing so since substantial evidence supports the district court's findings, and the findings are not clearly erroneous.

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[7]Goodyear did not argue to the district court in its objections to the discovery commissioner's recommendations or in its opposition filed January 8, 2007, in its countermotion for reconsideration filed January 17, 2007, nor in its objections filed January 26, 2007, that the sanctions for violating the order to produce the witness for deposition must be limited to deeming the documents in question to be authentic. To the contrary, Goodyear argued that all sanctions including these self-executing authentication sanctions were improper and should be vacated. Goodyear further argued that if sanctions were to be imposed, they should be limited to an order to provide supplemental discovery responses or monetary sanctions.

NRCP 37(d) sanctions

In addition to awarding sanctions pursuant to NRCP 37(b)(2)(C), and based upon its inherent equitable power, the district court may order sanctions under NRCP 37(d). NRCP 37(d) allows for the award of sanctions if a party fails to attend their own deposition or fails to serve answers to interrogatories or fails to respond to requests for production of documents. Among the sanctions that are authorized by this rule are for the court to enter an order striking a pleading or parts thereof. *See Foster*, 126 Nev. 56, 227 P.3d 1042; *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973).

The district court found that Goodyear answered numerous sets of interrogatories propounded by Bahena and Garm Investments, Inc., that did not have proper verifications. In addition, the district court found that the Goodyear witness did not attend a deposition prior to December 28, 2006, which was recommended by the discovery commissioner and subsequently ordered by the district court. Therefore, we conclude there is substantial evidence to support the findings of the district court and the district court did not abuse its discretion under NRCP 37(d) and its inherent equitable power by structuring non-case concluding sanctions to strike the answer of Goodyear as to liability only.

The district court has the discretion to conduct such hearings as are necessary to impose non-case concluding sanctions

[Headnote 6]

Goodyear argues that it was entitled to a full evidentiary hearing regarding the issue of striking Goodyear's answer as to liability only. We disagree.

Goodyear relies upon the case of *Nevada Power v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354 (1992). In that case, the district court dismissed the complaint of the Nevada Power Company and the California Department of Water Resources for alleged discovery abuses. *Id.* at 642-43, 837 P.2d at 1358. The case was concluded by dismissing the complaint with prejudice. *Id.* We reversed and said that because of the case ending dismissal of the Nevada Power complaint, it was entitled to an evidentiary hearing upon the issue of sanctions. In *Foster*, 126 Nev. 56, 227 P.3d 1042, the district court struck the defendants' answer as to both liability and damages and allowed the plaintiffs to establish their damages by way of a prove-up hearing. 126 Nev. at 63, 227 P.3d at 1047. The district court held the required evidentiary hearing since the sanctions were case concluding.

In this case, the district court denied Bahena's motion to strike Goodyear's answer as to damages and Bahena's motion to be al-

lowed to establish damages through a prove-up hearing. The district court permitted Goodyear to fully argue and contest the amount of damages, if any, that Bahena could prove to a jury. In fact, Goodyear prevailed and received a defense jury verdict upon Bahena's cause of action for punitive damages.

[Headnotes 7, 8]

Since the district court limited its sanctions to striking Goodyear's answer as to liability only, the sanctions were not case concluding ultimate sanctions. The sanctions were of the lesser nature similar to those imposed in *Clark County School District v. Richardson Construction*, 123 Nev. 382, 168 P.3d 87 (2007).[8] We conclude that when the court does not impose ultimate discovery sanctions of dismissal of a complaint with prejudice or striking an answer as to liability *and* damages, the court should, at its discretion, hold such hearing as it reasonably deems necessary to consider matters that are pertinent to the imposition of appropriate sanctions. The length and nature of the hearing for non-case concluding sanctions shall be left to the sound discretion of the district court. In determining the nature of this hearing, the district court should exercise its discretion to ensure that there is sufficient information presented to support the sanctions ordered. Further, the district court should make such findings as necessary to support its conclusions of the factors set forth in *Young*, 106 Nev. 88, 787 P.2d 777.

Sufficiency of the January 18, 2007, hearing

The district court set a hearing on January 18, 2007, to consider Bahena's motion to establish damages by way of a prove-up hearing and Goodyear's countermotion to reconsider sanctions. At the hearing, the district court allowed the attorneys for Bahena and Goodyear to make factual representations regarding the various discovery issues in dispute. The court also considered the record, which included exhibits and affidavits from other attorneys for Goodyear regarding the discovery disputes in question. The questions of the district court at the hearing to counsel pertained to various discovery requests that were propounded, and the failure of Goodyear to comply with the discovery commissioner's recommendations and subsequent court order to produce a witness for

[8]Also, we concluded in *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007), that a case can be dismissed, which results in a dismissal with prejudice, when a party fails to comply with the discovery requirements of NRCP 16.1. We did not hold that the Arnolds were entitled to an evidentiary hearing prior to the entry of the order of dismissal. However, we did conclude that there is no heightened standard of review in that situation. *Id.* at 418, 168 P.3d at 1055.

deposition prior to December 28, 2006. The district court further considered the objections that had been previously filed by Goodyear to the recommendations of the discovery commissioner regarding the deposition witness.

Since the district court considered all affidavits and exhibits, and permitted the attorneys for Bahena and Goodyear to make factual representations to the court, we conclude that the district court conducted a sufficient hearing. Based upon the factual representations made by the attorneys, as officers of the court, and the balance of the record, the district court crafted its own findings of fact and conclusions of law emanating from this hearing.[9] The nature of the hearing complied with the requirements of *Young*, 106 Nev. 88, 787 P.2d 777. Therefore, the district court did not abuse its discretion by the way it structured the hearing since the record was sufficient for the court to make its findings of willfulness.[10]

Compensatory damages

[Headnote 9]

Goodyear contends that the compensatory damages awarded by the jury are excessive. We disagree.

In *Guaranty National Insurance Company v. Potter*, we concluded that ''this court will affirm an award of compensatory damages unless the award is so excessive that it appears to have been given under the influence of passion or prejudice'' and ''an appellate court will disallow or reduce the award if its judicial conscience is shocked.'' 112 Nev. 199, 206-07, 912 P.2d 267, 272 (1996) (quotations and citations omitted). We subsequently held that ''[s]ince special damages are a species of compensatory damages, a jury has wide latitude in awarding them. So long as there is an evidentiary basis for determining an amount that is reasonably accurate, the amount of special damages need not be mathe-

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[9]Rule 3.3 of the Nevada Rules of Professional Conduct sets forth the standards of candor that a lawyer has toward a court. Rules 3.3(a)(1) and (3) provide that a lawyer shall not knowingly ''[m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer'' or ''[o]ffer evidence that the lawyer knows to be false.''

[10]Although Goodyear inquired at the end of the hearing if the district court wanted to hear its additional objections to the district court's ruling, the court stated that it had listened to Goodyear's counsel at length and read Goodyear's paperwork. At this hearing, Goodyear did not request to make an offer of proof as to what additional evidence Goodyear would present if the district court held an expanded evidentiary hearing regarding the discovery sanctions. However, the district court did consider, in its January 29, 2007, order, a supplement to exhibits that was filed by Goodyear the day after the January 18, 2007, hearing, together with objections filed January 26, 2007.

matically exact.'' *Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 737, 192 P.3d 243, 251 (2008) (footnote omitted).

[Headnote 10]

The compensatory damages are supported by substantial evidence. We must '' 'assume that the jury believed all [of] the evidence favorable to the prevailing party and drew all *reasonable* inferences in [that party's] favor.' '' *Id*. at 739, 192 P.3d at 252 (alteration in original) (quoting *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006)). Because of the loss of life and the serious injuries suffered by the appellants, we conclude there was a sufficient evidentiary basis for the award of all the compensatory damages. We further conclude that the amount of compensatory damages are not excessive and do not shock our judicial conscience.

Punitive damages

Bahena contends that the district court improperly required the appellants to establish liability for punitive damages. We disagree.

[Headnote 11]

The district court has the discretion to determine what degree Goodyear was entitled to participate in the trial when it struck Goodyear's answer as to liability. *See Hamlett v. Reynolds*, 114 Nev. 863, 866-67, 963 P.2d 457, 458 (1998). Therefore, we conclude that the district court did not abuse its discretion regarding the punitive damage liability issue by refusing to impose case concluding sanctions.

CONCLUSION

For all the reasons set forth above, the judgment of the district court is affirmed.[11]

PARRAGUIRRE, C.J., and HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

PICKERING, J., dissenting:

The majority's decision to uphold the $30,000,000 default judgment in this case relies heavily on our deferential standard of review, and, in doing so, ignores the unanswered, material questions of whether Goodyear's alleged discovery abuse was willful and whether it prejudiced Bahena. Without an evidentiary hearing to resolve those questions, striking Goodyear's answer was an abuse of discretion and a violation of Goodyear's due process rights.

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[11]We have considered the other issues raised by the parties and conclude they are without merit.

I.

Although our review of discovery abuse sanctions is deferential, contrary to the majority's view, that deference ''does not automatically mandate adherence to [the district court's] decision.'' *McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 172 (6th Cir. 2003). ''''Deferential review is not no review,'' and ''deference need not be abject.'''' *Id.* (quoting *Hess v. Hartford Life & Acc. Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001) (quoting *Gallo v. Amoco Corp.*, 102 F.3d 918, 922 (7th Cir. 1996))).

Our policy favoring disposition on the merits requires us to apply a heightened standard of review where the sanction imposed, as in this case, is liability-determining. *Havas v. Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 707-08 (1980); *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779-80 (1990). In *Nevada Power Co. v. Fluor Illinois*, we held that the district court abused its discretion when it dismissed a complaint and imposed other sanctions without first holding an evidentiary hearing on factual issues related to the meaning of discovery orders and whether those orders had been violated. 108 Nev. 638, 646, 837 P.2d 1354, 1360 (1992). In reversing the district court, we held that ''[i]f the party against whom dismissal may be imposed raises a question of fact as to any of these factors, the court *must* allow the parties to address the relevant factors in an evidentiary hearing.'' *Id.* at 645, 837 P.2d at 1359 (emphasis added).

While the majority distinguishes this case from *Nevada Power* by characterizing the sanctions as ''non-case concluding,'' the reality is that striking Goodyear's answer did effectively conclude this case. The sanction resulted in a default liability judgment against Goodyear and left Goodyear with the ability to defend on the amount of damages only. Liability was seriously in dispute in this case,[1] but damages, once liability was established, were not, given the catastrophic injuries involved. Thus, striking Goodyear's answer was akin to a case concluding sanction, placing this case on the same footing as *Nevada Power*.

Surprisingly, the majority relies on *Young v. Johnny Ribeiro Building*. What it misses in *Young* is that we affirmed the claim-concluding sanctions there only because the district ''court treated Young fairly, *giving him a full evidentiary hearing*.'' 106 Nev. at 93, 787 P.2d at 780 (emphasis added). This case thus is not like *Young* but rather like *Nevada Power*, in that the district court erred as a matter of law in not holding an evidentiary hearing.

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[1]Goodyear avoided punitive damages in this case by arguing that a road hazard, rather than design or manufacturing defect, caused the tire failure from which this accident resulted. This suggests that its defenses to liability had a reasonable chance of success.

II.

When the district court struck Goodyear's answer, Goodyear's counsel had raised several factual questions about Goodyear's willfulness and the extent of any prejudice to Bahena. However, the district court did not hold or conduct the evidentiary hearing required by *Nevada Power* and *Young* to resolve the questions of fact before striking Goodyear's answer and all defenses to liability. This is, I submit, an example of ''Sentence first—verdict afterwards,'' that does not deserve deferential review. Lewis Carroll, *Alice's Adventures in Wonderland*, Chapter XII ''Alice's Evidence'' (MacMillan and Co. 1865).

The district court entered three discovery orders based on the Discovery Commissioner's recommendations. Because the first order merely set the language for Goodyear's protective order, it is not a discovery order that Goodyear could have violated. The remaining two orders were both entered by the district court on January 5, 2007, just four days prior to the district court's decision to strike Goodyear's answer.

The second order adopted the Discovery Commissioner's December 5, 2006, recommendation that all counsel meet and review written discovery to reach an agreement as to what discovery obligations remained unfulfilled. Goodyear's attorneys submitted affidavits averring that they met and conferred telephonically with Bahena on December 15, 2006. According to Goodyear, it requested that Bahena present it with a list of documents Bahena wanted authenticated and a list of any other discovery issues. Goodyear claims that Bahena failed to produce these lists. Nonetheless, even if Bahena had provided Goodyear with the lists, the terms of the recommendation gave Goodyear 30 days, or until January 15, 2007, to ''conclusively respond to what was requested.'' This order cannot justify the district court's sanction order since the time for complying with its obligations (January 15, 2007) came six days *after* the district court ordered Goodyear's answer stricken (January 9, 2007).

The third order similarly adopted a recommendation by the Discovery Commissioner, this one dated December 14, 2006, and recommending that by December 28, 2006, Goodyear produce a representative to authenticate the 74,000 adjustment and claims documents that Goodyear had produced months earlier under NRCP 34, as they were kept in the ordinary course of its business.[2] Goodyear made a timely objection to this recommendation on

[2]The core dispute appears to have been whether Goodyear was entitled to produce the documents as kept in the ordinary course of its business as NRCP 34 permits or should be required to create an index of the documents to facilitate their review, a dispute driven in part, according to Goodyear, by the breadth of the discovery sought.

January 3, 2007. This recommendation also is problematic as the predicate for the severe sanctions imposed. Significantly, in his December 14 recommendation, the Discovery Commissioner *rejected* Bahena's request to strike Goodyear's answer as sanctions and instead provided a self-executing ''deemed authentic'' noncompliance penalty.[3] Also important, the parties disputed the meaning of—and consequence of violating—this recommendation. Bahena offered to seek clarification from the court—and did so on December 29, 2006, a day after Goodyear was supposed to comply with this third recommendation. The fact that Bahena, not Goodyear, sought clarification supports Goodyear's position that an unresolved dispute existed among the lawyers as to what, precisely, the Discovery Commissioner had directed them to do. Further confusing things, the parties were not able to get back before the Discovery Commissioner over the holiday or thereafter because of his impending retirement, effective December 31.

The majority's reasoning does not acknowledge the confusion surrounding these issues but instead defers to the district court's finding that Goodyear failed to comply with the discovery recommendations. Based on Goodyear's assertions, however, which it supported by affidavit, there are genuine, material questions of whether Goodyear willfully abused the discovery process. Without resolution of these questions through an evidentiary hearing, an ultimate sanction was premature.

III.

Goodyear additionally raised questions of whether the alleged discovery abuse prejudiced Bahena. Goodyear maintains that Bahena was prepared for trial and therefore did not need the additional discovery sought to be compelled. Bahena admitted to being ready for trial on January 4, 2007, before the district court struck Goodyear's answer.

Goodyear further contends that Bahena's trial experts did not need Goodyear to provide more specificity with respect to the disputed documents, which comprised adjustment and claims data relating to various tires. Rather, Goodyear asserts that Bahena's experts had already formed their opinions prior to Bahena's request and were amply familiar with the documents as produced by Goodyear from other Goodyear products liability litigation in which the same set of documents had been produced. In a Sep-

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[3]The Discovery Commissioner included the following express noncompliance penalty in his December 14 recommendation, making it self-executing: ''Any document Goodyear's representative does not either affirm or deny as authentic will be deemed authentic.'' Goodyear had no indication that noncompliance risked more serious penalty. Of note, Bahena did not file cross-objections to either of the Discovery Commissioner's reports and recommen-

tember 29, 2006, deposition, Bahena's expert, Dennis Carlson, stated that all of his opinions were contained in his report and that he was prepared to give his expert testimony. Carlson further revealed that his opinions were not based on adjustment or claims data. Additionally, the July 5, 2006, report of another Bahena expert, Allan Kam, states that Kam supported his conclusions with claims data he already had for a nearly identical tire. Moreover, Bahena did not refute Goodyear's assertion that its expert Kam, through prior litigation involving Goodyear and its adjustment and claims documents, already reviewed and produced reports on the same documents Goodyear produced elsewhere in other lawsuits without the index that became the source of the core discovery dispute in this case.

Goodyear also asserts that Bahena contributed to any prejudice it may have suffered by making delayed discovery requests and contributing to discovery and case management problems. Bahena served its third set of written discovery on November 10, 2006, less than 30 days before the December 7, 2006, discovery cutoff date.[4] Goodyear responded to the discovery request on December 13, 2006, which was within 30 days, after allowing 3 days for mailing, missing the verification required by NRCP 33 but promising to supply it. Bahena filed its motion to compel answers to this third set of discovery on December 29, 2006. Goodyear opposed the motion on the grounds that Bahena filed it after the discovery cutoff date and that Bahena's third discovery request came too close to trial.

The majority's decision defers to the district court's recitation that Bahena suffered prejudice. Without an evidentiary hearing to resolve the existence and extent of the prejudice—including whether imposing liability-terminating sanctions was required to stanch that prejudice—we have no findings to which deference is due.

IV.

This court would not affirm summary judgment where a party had raised factual disputes like those asserted here concerning

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dations, in which the Discovery Commissioner denied Bahena's requests for sanctions. While the majority tries to shore up the district court's order by citing the Discovery Commissioner's ''findings'' as those made by a ''master,'' the exercise fails because (1) the Discovery Commissioner didn't hold an evidentiary hearing and (2) the relevant finding he made was that the discovery issues did not merit the severe sanctions Bahena sought, a finding Bahena accepted by not objecting to it.

[4]The majority goes with the December 15, 2006, discovery cutoff date referenced in some of the motion papers in the district court. If the court-ordered discovery cutoff date of December 7, 2006, was extended to December 15, 2006, the order by which this extension was granted does not appear in the record. From what appears, the court-ordered cutoff was December 7, 2006.

willfulness and prejudice. However, the majority's decision is analogous to affirming summary judgment despite the record presenting numerous unresolved factual issues.

While the majority relies on the district court's inherent power to impose sanctions, due process requirements limit that power. *See Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) (citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-54 (1909)). ''Sanctions interfering with a litigant's claim or defenses violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case.'' *Id.* at 591 (citing *G-K Properties v. Redevelopment Agency, Etc.*, 577 F.2d 645, 648 (9th Cir. 1978)). Put another way, the district court's sanction must relate to the prejudice caused by the matter at issue in the discovery order. *Id.* With no evidentiary hearing to decide the disputed issues of fact, the benefit of the doubt on them should go to the party who lost, not the party who won. Applying this familiar summary judgment standard, striking Goodyear's answer appears to have been an excessive penalty and was not proportional to Bahena's discovery dispute claims. To uphold this ultimate sanction in the face of these factual questions and without the benefit of an evidentiary hearing violates the most fundamental of due process rights and for that reason, I respectfully dissent.

CITY OF RENO, APPELLANT, *v.* CITIZENS FOR COLD SPRINGS; ANTHONY MIDMORE; AND JOAN LISCOM, RESPONDENTS.

No. 50301

July 29, 2010 236 P.3d 10

Appeal from an amended district court order in a land use action. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Residents and property owners in rural area annexed by city brought action challenging city amendment to city master plan and adoption of zoning ordinance. Following a hearing, the district court entered judgment for plaintiffs, and city appealed. The supreme court, GIBBONS, J., held that: (1) petition for judicial review was the proper vehicle to challenge amendment to master plan and adoption of zoning ordinance, (2) city complied with statute requiring that amendments to city master plans be approved by a regional planning agency when resolution contained a provision preventing it from becoming effective until it was approved, (3) city municipal code required city to make a finding about

plans for adequate water services and infrastructure when it adopted zoning ordinance, and (4) city failed to make adequate findings regarding adequate water services as required by city code.

Affirmed in part and reversed in part.

John J. Kadlic, City Attorney, and *Marilyn D. Craig*, Deputy City Attorney, Reno, for Appellant.

John L. Marshall, Reno, for Respondents.

McDonald Carano Wilson LLP and *Michael A.T. Pagni* and *Mark W. Dunagan*, Reno, for Amici Curiae.

1. MANDAMUS.
   A writ of mandamus is a remedy that exists to compel the performance of an act which the law especially enjoins as a duty resulting from office.
2. MANDAMUS.
   A writ of mandamus can correct a governing body's manifest abuse of discretion in zoning cases.
3. ZONING AND PLANNING.
   Petition for judicial review was proper vehicle for residents and property owners in rural area annexed by city to challenge city's amendment to its master plan and adoption of zoning ordinance, though adoption of an ordinance was a legislative action, as residents and owners raised procedural issues regarding the amendment and ordinance, and were not requiring the courts to consider the substance or content of the enactments. NRS 278.3195(4).
4. ZONING AND PLANNING.
   Though enactment of zoning ordinances and amendments by local municipal entities constitutes sound legislative action, the procedural actions of municipal legislative entities may still be subject to judicial review.
5. ZONING AND PLANNING.
   When considering petitions for judicial review in zoning cases, courts review the agency record to decide whether substantial evidence supports the governing body's findings. NRS 278.3195(4).
6. ZONING AND PLANNING.
   Substantial evidence is that which a reasonable mind could accept as sufficient to support a conclusion.
7. ZONING AND PLANNING.
   In an appeal in a zoning case, supreme court will not substitute its judgment for that of a municipal entity if substantial evidence supports the entity's action. NRS 278.3195(4).
8. APPEAL AND ERROR.
   Statutory construction is a question of law reviewed de novo.
9. APPEAL AND ERROR.
   Courts apply a de novo standard of review when interpreting municipal code provisions.

10. STATUTES.
When the language in a statute is clear and unambiguous, the supreme court gives effect to that meaning and will not consider outside sources beyond that statute.

11. STATUTES.
If there is more than one reasonable interpretation of a statute, the supreme court considers legislative intent and other similar statutory provisions when construing the statute's language.

12. ZONING AND PLANNING.
City complied with statute requiring that amendments to city master plan be approved by regional planning agency before amendments were adopted, when it amended master plan to designate land uses in adjacent rural area that city had annexed, where city resolution amending master plan contained a provision that prevented resolution from becoming effective until regional planning commission determined that amendment conformed to the regional plan. NRS 278.0282.

13. MUNICIPAL CORPORATIONS.
Courts must construe ordinances in a manner that gives meaning to all of the terms and language.

14. MUNICIPAL CORPORATIONS.
Courts should read each sentence, phrase, and word of an ordinance to render it meaningful within the context of the purpose of the legislation.

15. ZONING AND PLANNING.
City municipal code required city, when it approved zoning-map amendment for annexed rural area, to make a finding about plans for adequate services and infrastructure to the area, including an estimate of the water services and infrastructure required to serve the proposed development facilitated by the zoning amendment and how the city planned to meet the demand.

16. ZONING AND PLANNING.
City failed to make a sufficient finding, as required by city municipal code, when it approved zoning-map amendment for annexed rural area, regarding how officials planned to meet the water demands and infrastructure needs generated by proposed development in the annexed area; while city was not required by its code to set forth detailed development plans for water services and infrastructure, city planning commission and city council merely set forth broad conclusions stating how utilities could be built or expanded if necessary.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider whether the City of Reno violated Nevada law by conditionally approving amendments to the Reno Master Plan prior to the Truckee Meadows Regional Planning Commission's decision that the proposed amendments conformed to the Truckee Meadows Regional Plan. We also consider whether

the City violated a former provision in the Reno Municipal Code (RMC) by failing to make a sufficient finding about plans for water services and infrastructure before passing a zoning ordinance that corresponded with the proposed master-plan amendments. We conclude that the City complied with Nevada law because the master-plan amendments only became effective after the Regional Planning Commission determined that the proposed amendments conformed to the regional plan. We further conclude that the City violated the RMC because the findings it made prior to approval of the zoning ordinance about planned water services and infrastructure deferred the subject to a later date and were too general in nature to satisfy the mandates of the code. Therefore, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

I. *Passage of Resolution 6712 and Ordinance 5809*

Cold Springs is a predominately rural area located north of Reno. It is a closed hydrographic basin that traps water and sewer outflow within its confines. Because of the closed nature of Cold Springs' water services and infrastructure, there are limited water supplies and sewage disposal available to its citizens. In 2005, the City passed a zoning ordinance that annexed approximately 6,800 acres of undeveloped land in Cold Springs.[1] The City annexed this land because developers proposed substantial urbanization in the area, including 13.5 million square feet of new commercial space and 6,860 new residential units. After the annexation, Nevada's statutory scheme required the Reno Planning Commission and City Council to modify the City's master plan and zoning provisions before development could begin.

Pursuant to NRS 278.030(1), the governing entity of each Nevada city with a population of 25,000 people or more must create a planning commission. City planning commissions are responsible for drafting and adopting master plans. *Sustainable Growth v. Jumpers, LLC*, 122 Nev. 53, 62, 128 P.3d 452, 459 (2006) (citing NRS 278.150(1)-(2)). Master plans contain long-term, comprehensive guides for the orderly development and growth of an area. *Id.* (citing NRS 278.150(1)-(2)). Before adopting a substantial amendment to a master plan, the city planning commission must hold at least one public hearing after providing notice by publication of the hearing's time and place. NRS 278.210(1). Once the city planning commission adopts the master-plan amendments, the local governing body may adopt such

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[1]This court considered issues surrounding the annexation of land in Cold Springs in the case of *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 218 P.3d 847 (2009).

amendments if they can be practically applied for the area's development. NRS 278.220(1). Before adopting any amendment, however, the governing body must hold a public hearing after providing notice by publication of the hearing's time and place. NRS 278.220(3).

When a governing body adopts an amendment to a master plan, it must also abide by the procedures set forth in NRS 278.0282. Subsection 1 of NRS 278.0282 states that ''[b]efore the adoption or amendment of any master plan, . . . each governing body and any other affected entity shall submit the proposed plan or amendment to the regional planning commission.'' Once the governing body submits the proposed master-plan amendment, the regional planning commission shall ''determine whether the proposed plan or amendment conforms with the comprehensive regional plan.'' NRS 278.0282(1). Regional plans set forth goals and policies for the physical development and orderly management of the regional area in question. NRS 278.0272(1)-(2).

Governing bodies may also enact zoning ordinances with a procedure similar to that used to adopt amendments to master plans. NRS 278.260(1) sets forth that local governing entities must provide for the manner in which zoning ordinances are amended. Under RMC section 2.100, a local committee must first consider a proposed ordinance and, after the city meets requirements for the notice and publication of the provision, the Reno City Council must either adopt or reject the proposed ordinance within 45 days after the publication. Any proposed zoning changes must also substantially conform to the applicable master plan. *Nova Horizon v. City Council, Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989). Pursuant to NRS 278.0284, ''[a]ny action of a local government relating to . . . zoning . . . must conform to the master plan of the local government. In adopting any ordinance or regulation relating to . . . zoning, . . . the local government shall make a specific finding that the ordinance conforms to the master plan.'' In addition, NRS 278.250(2) states that ''zoning regulations must be adopted in accordance with the master plan for land use.''

In this case, the Reno Planning Commission held a public hearing to discuss amendments to the Reno Master Plan and the passage of a corresponding zoning ordinance. The proposed zoning ordinance would rezone the subject property in Cold Springs from generally rural land-use designations to industrial, commercial, and urban residential classifications. The proposed master-plan amendments would alter the Reno Master Plan so that it was in agreement with the proposed zoning ordinance. The Reno Planning Commission then approved the master-plan amendments and corresponding zoning ordinance. When considering these provisions, it deferred issues about supplying the prospective development with water services and infrastructure to a later date.

After the Reno Planning Commission approved the proposed amendments and ordinance, the Reno City Council considered them at a public hearing. The City Council then conditionally approved the master-plan amendments in Resolution 6712, which would change the Reno Master Plan by altering the land-use designations for the subject property. The resolution stated that it would ''become effective upon a determination of conformance by the Regional Planning Commission.'' Next, the City Council changed Cold Springs' rural zoning designations to primarily urban designations in Ordinance 5809. Although Ordinance 5809 originally stated that it would become effective several days after its adoption, the City Council amended the ordinance so that it would become effective upon the Regional Planning Commission's determination that the master-plan amendments conformed to the regional plan. When passing Resolution 6712 and Ordinance 5809, the City Council did not find that Cold Springs' existing water services and infrastructure were adequate to serve the potential growth on the property. Nor did it make a finding specifying plans to supply additional water services and infrastructure to the subject property to meet the anticipated demand caused by development.

Following the passage of these provisions, the City Council submitted the proposed master-plan amendments to the Regional Planning Commission at the Truckee Meadows Regional Planning Agency so that it could determine whether the amendments conformed to the Truckee Meadows Regional Plan. The Nevada Legislature created the Truckee Meadows Regional Planning Agency in 1989 to foster coordination between Reno, Sparks, and Washoe County. The agency is comprised of a director, staff, the Regional Planning Governing Board, and the Regional Planning Commission. The agency adopted the first Truckee Meadows Regional Plan in 1991. Then in 2002, it adopted a regional plan that created a streamlined, simplified process for coordinating land-use development in Reno, Sparks, and Washoe County. In this case, the Regional Planning Commission unanimously determined that the proposed amendments to the Reno Master Plan conformed to the Truckee Meadows Regional Plan. Upon the finding of conformance, both Resolution 6712 and Ordinance 5809 went into effect.

II. *District court proceedings*

Respondents filed suit against the City in 2006. Respondents consist of citizens, taxpayers, residents, and property owners of the subject land in Cold Springs. They are concerned about the proposed urbanization and development in Cold Springs because this area has limited water supplies and infrastructure. Their complaint requested declaratory and injunctive relief, and petitioned for a

writ of mandamus. After the parties experienced confusion regarding the proper mechanism for respondents' challenge, respondents filed an amended complaint that petitioned for both a writ of mandamus and judicial review.

In the amended complaint, respondents alleged that the City erred by adopting Ordinance 5809 because this zoning ordinance did not conform to the existing master plan at the time of its passage and adoption. According to respondents, the City attempted to amend the existing master plan by adopting Resolution 6712, but it failed to properly enact the resolution because it did not obtain a determination from the Regional Planning Commission stating that the master-plan amendments conformed to the regional plan prior to the resolution's passage. Respondents also alleged that the City erred by adopting Ordinance 5809 because the City did not make a finding about plans for water services and infrastructure prior to the ordinance's passage, nor did the ordinance promote orderly development.

The district court considered respondents' arguments during a hearing. After the hearing, the district court ordered the City to set aside Ordinance 5809. The parties then agreed to submit a proposed amended order to the district court to clarify its findings. In the amended order, the district court concluded that ''the requirements of first obtaining an amendment to the Master Plan and having a plan to provide services are more than mere procedural guidelines.'' Although the district court did not order the City to set aside Resolution 6712, it partly based its decision to mandate that the City set aside Ordinance 5809 upon the premise that the City did not properly amend the Reno Master Plan before adopting Ordinance 5809. The district court also concluded that the City disregarded procedure in the RMC when adopting Ordinance 5809 because it did not make a finding regarding plans for the provision of services and infrastructure necessary due to the future development in Cold Springs. The City now appeals from the district court's amended order.

DISCUSSION

I. *Standard of review*

[Headnotes 1, 2]

In this case, respondents filed a complaint in district court for declaratory and injunctive relief, and for a writ of mandamus. A writ of mandamus is a remedy that exists ''to compel the performance of an act which the law especially enjoins as a duty resulting from office.'' *Board of Comm'rs v. Dayton Dev. Co.*, 91 Nev. 71, 75, 530 P.2d 1187, 1189 (1975). This extraordinary

remedy can also correct a governing body's manifest abuse of discretion in zoning cases. *Id.*

After respondents filed their complaint, this court issued its decision in *Kay v. Nunez*, 122 Nev. 1100, 146 P.3d 801 (2006). In *Kay*, the appellant filed petitions in district court for a writ of mandamus and judicial review to contest a local government's zoning and land-use decision. *Id.* at 1103, 146 P.3d at 804. This court concluded in *Kay* that a petition for judicial review was the proper mechanism for seeking review of a local government's zoning and planning decision in district court. *Id.* at 1104-06, 146 P.3d at 804-05. The court arrived at this conclusion based on the express language in NRS 278.3195(4), which sets forth that a person who administratively appeals a zoning decision under the applicable ordinance to the governing board and is aggrieved by the board's decision may appeal by timely filing a petition for judicial review in district court. *Id.* at 1104-05, 146 P.3d at 804-05.

[Headnote 3]

Given the ruling in *Kay*, respondents amended their complaint to petition for both a writ of mandamus and judicial review. After a hearing, the district court ordered the City to set aside Ordinance 5809. In its order, the district court noted that the parties initially disputed whether a petition for a writ of mandamus or for judicial review was the appropriate vehicle for respondents' challenge. The district court also noted that later on during the proceedings, the parties appeared to agree that the proper vehicle was a writ of mandamus. The City continues to argue on appeal that the proper vehicle for respondents' challenge was a writ of mandamus. According to the City, a petition for judicial review is improper in this case because the City's enactment of Ordinance 5809 was a legislative act that is not subject to NRS 278.3195(4). However, we conclude that the petition for judicial review was the proper mechanism.

[Headnote 4]

The enactment of zoning ordinances and amendments by local municipal entities constitutes sound legislative action. *McKenzie v. Shelly*, 77 Nev. 237, 242, 362 P.2d 268, 270 (1961). Some courts do not extend judicial review to the legislative process of enacting zoning amendments. 4 Patricia E. Salkin, *American Law of Zoning* § 42:5 (5th ed. 2010). However, the procedural actions of municipal legislative entities may still be subject to judicial review. *Id.* In *City of Beechwood Village v. Council, Etc.*, 574 S.W.2d 322, 323 (Ky. Ct. App. 1978), the Court of Appeals of Kentucky reviewed an amendment to a zoning map adopted by a local legislative body. The court in *Beechwood Village* invalidated the zoning amendment because the local legislative body failed to make a suf-

ficient finding explaining why the amendment conformed to the community's comprehensive plan. *Id.* at 323-25.

Similarly, the Court of Appeals of New York concluded in *Voelckers v. Guelli*, 446 N.E.2d 764, 767-68 (N.Y. 1983), that courts could judicially review the voting procedures used by local town boards to enact zoning amendments. In *Voelckers*, respondents argued on appeal that the lower courts had exceeded their authority by reviewing a legislative action, meaning the town board's action related to a proposed zoning code amendment. *Id.* at 767. The court disagreed and concluded that ''a determination of such a nature—addressing a question of procedure only, eschewing any intrusion into the substance of the matter being voted on—is within the scope of judicial authority.'' *Id.* at 768.

In this case, we consider two procedural issues raised by the parties: (1) whether the City complied with NRS 278.0282 when passing the amendments to the Reno Master Plan in Resolution 6712, and (2) whether the City complied with former RMC section 18.06.404(d)(1)(b) when rezoning the subject property in Ordinance 5809. Because these issues are procedural and do not require this court to consider the substance or content of the enactments, we conclude that a petition for judicial review was the proper vehicle for respondents' challenge. *See Voelckers*, 446 N.E.2d at 767-68.

[Headnotes 5-7]

When considering petitions for judicial review in zoning cases, both the district court and this court review the agency record to decide whether substantial evidence supports the governing body's findings. *Kay*, 122 Nev. at 1105, 146 P.3d at 805. Substantial evidence is that which a reasonable mind could accept as sufficient to support a conclusion. *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). This court will not substitute its judgment for that of a municipal entity if substantial evidence supports the entity's action. *McKenzie*, 77 Nev. at 240, 362 P.2d at 269.

[Headnotes 8-11]

The two issues on appeal also require this court to interpret NRS 278.0282 and former RMC section 18.06.404(d)(1)(b).[2] ''Statutory construction is a question of law, which this court reviews de novo.'' *Kay*, 122 Nev. at 1104, 146 P.3d at 804. Courts also apply a de novo standard of review when interpreting municipal code

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[2]The City amended RMC section 18.06.404 on September 9, 2009, after the district court issued its amended order in this case on June 5, 2008. Thus, we will analyze this matter in accordance with the version of RMC section 18.06.404 that was in effect on June 5, 2008.

provisions. *U.S. v. Iverson*, 162 F.3d 1015, 1019 (9th Cir. 1998); *Asphalt Specialt. v. City of Commerce City*, 218 P.3d 741, 745 (Colo. App. 2009). When the language in a provision is clear and unambiguous, this court gives ''effect to that meaning and will not consider outside sources beyond that statute.'' *NAIW v. Nevada Self-Insurers Association*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010). If there is more than one reasonable interpretation of the statute, this court considers legislative intent and other similar statutory provisions when construing the statute's language. *Id.*

II. *The City complied with NRS 278.0282 when passing Resolution 6712*

[Headnote 12]

The City argues on appeal that it complied with Nevada law, specifically NRS 278.0282, when passing amendments to the Reno Master Plan in Resolution 6712. According to the City, it properly adopted Resolution 6712 because its language stated that the master-plan amendments would only become effective after the Regional Planning Commission determined that the proposed amendments conformed to the regional plan. Respondents argue that the City violated NRS 278.0282 because it adopted the master-plan amendments prior to the Regional Planning Commission's determination that the amendments conformed to the regional plan. We conclude that the City's argument has merit.

NRS 278.0282(1) states that ''[b]efore the adoption or amendment of any master plan, . . . each governing body and any other affected entity shall submit the proposed plan or amendment to the regional planning commission.'' Once the governing body submits the proposed master-plan amendment, the Regional Planning Commission shall ''determine whether the proposed plan or amendment conforms with the comprehensive regional plan.'' NRS 278.0282(1). If the commission concludes that the master-plan amendment does not conform to the regional plan, it must specify which parts of the amendment do not conform and explain its reasoning. *Id.*

In this case, the Reno City Council passed amendments that altered the land-use designations for Cold Springs in the Reno Master Plan. It conditionally approved these proposed amendments in Resolution 6712, before the Truckee Meadows Regional Planning Commission found that the amendments conformed to the Truckee Meadows Regional Plan. The City Council included a provision in Resolution 6712 that stated the amendments would only ''become effective upon a determination of conformance by the Regional Planning Commission.'' After the City submitted the master-plan amendments to the Regional Planning Commission, the commission unanimously concluded that the proposed amendments conformed to the regional plan and the resolution became operative.

We conclude that the sequence of events used when passing Resolution 6712 complied with the procedures set forth in NRS 278.0282. Subsection 1 of NRS 278.0282 requires that a governing body submit ''proposed'' amendments to the Regional Planning Commission prior to the amendment of a master plan. The term ''proposed'' indicates that the Regional Planning Commission must review master-plan amendments before they are ratified and become effective.

Caselaw draws a distinction between proposed amendments and ratified or effective amendments. *See, e.g.*, *Kimble v. Swackhamer*, 94 Nev. 600, 602, 584 P.2d 161, 162 (1978) (the Legislature could ''ratify or reject a proposed amendment to the federal constitution'' (discussing *Hawke v. Smith*, 253 U.S. 221 (1920))); *Williams v. Griffin*, 91 Nev. 743, 745, 542 P.2d 732, 733 (1975) (agencies may refuse to issue permits when doing so would conflict with proposed ordinances that are not yet in effect); *Maragliano v. Land Use Bd.*, 957 A.2d 213, 215 (N.J. Super. Ct. App. Div. 2008) (if a governing body proposes to amend a zoning ordinance, planning boards should not grant development approvals until the amendment takes effect). Because the City added a provision to Resolution 6712 that prevented the resolution from becoming effective until the Regional Planning Commission determined that the proposed master-plan amendments conformed to the regional plan, we conclude that the City complied with the express language in NRS 278.0282 when adopting Resolution 6712.

III. *The City violated former RMC section 18.06.404(d)(1)(b) when passing Ordinance 5809*

The City argues that the district court erred when it ordered that Ordinance 5809 be set aside because the City complied with former RMC section 18.06.404(d)(1)(b) when passing the ordinance. According to the City, this municipal code provision did not require the local government to make a finding setting forth detailed plans about water services and infrastructure prior to the approval of Ordinance 5809. Respondents argue that the City failed to comply with former RMC section 18.06.404(d)(1)(b) when enacting Ordinance 5809 because it did not make a sufficient finding about the plans for water services and infrastructure.

A. *The requirements of former RMC section 18.06.404(d)(1)(b)*

Former RMC section 18.06.404(d)(1)(b) mandated that when approving a zoning-map amendment, the Reno Planning Commission and City Council must find that there is a plan to support proposed development with sufficient services and infrastructure. It stated the following:

> In approving any zoning map amendment, the planning commission and city council shall find the following:
>
> . . . .
>
> b. The change in zoning represents orderly development of the city and there are, or are planned to be adequate services and infrastructure to support the proposed zoning change and existing uses in the area.

RMC § 18.06.404(d)(1)(b) (2008). Because this version of the code was in effect at the time when the district court issued its amended order, we analyze the appeal under former RMC section 18.06.404(d)(1)(b).[3]

In this case, the parties acknowledge that the existing water and sewer services in Cold Springs cannot support the proposed development and urbanization permitted by the change in zoning. Because Cold Springs' existing water and sewer services cannot support the proposed development, former RMC section 18.06.404(d)(1)(b) required the Reno Planning Commission and City Council to make a finding, when passing Ordinance 5809, regarding plans to supply adequate water services and infrastructure to support the proposed development. The City argues that it complied with this former code provision because it made findings which set forth that the details regarding the provision of water services and infrastructure would be established before development begins. According to the City, it was improper for the district court to require detailed plans about water services and infrastructure at the zoning and planning stage of the process.

[Headnotes 13-15]

We conclude that this is not a reasonable interpretation of former RMC section 18.06.404(d)(1)(b). Courts must construe ordinances in a manner that gives meaning to all of the terms and language. *Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). Courts ''should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.'' *Id.* The City's interpretation that former RMC section 18.06.404(d)(1)(b) permits governing entities to defer findings or make broad conclusions about services and infrastructure would render the following phrase in the code to be meaningless:

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[3]Similar to former RMC section 18.06.404(d)(1)(b), the current version of RMC section 18.06.404(d)(1) states that the Reno Planning Commission and City Council ''shall make findings regarding the requirements of NRS 278.250(2), as applicable, and the proposed amendment's conformity to the City of Reno Master Plan.'' Pursuant to NRS 278.250(2), local governments must design zoning regulations to, among other things, ''preserve the quality of air and water resources'' and ''develop a timely, orderly and efficient arrangement of transportation and public facilities and services.''

''the planning commission and city council shall find . . . there are, or are planned to be adequate services and infrastructure to support the proposed zoning change and existing uses in the area.'' Also, deferring the requirement to make a finding about plans for adequate services and infrastructure could prevent governing entities from designing proper zoning regulations that promote the orderly development of an area.

In contrast, respondents in this case interpret former RMC section 18.06.404(d)(1)(b) as requiring local governments to make a finding about plans for adequate services and infrastructure prior to the adoption of amendments to the master plan. This constitutes a reasonable interpretation of the former code provision. Pursuant to this provision's plain language, governing entities must make a finding during the zoning and planning stage of development about how officials plan to meet the water and infrastructure demands generated by the proposed zoning change. The provision's clear and unambiguous language does not permit governing entities to merely defer findings regarding plans for water services and infrastructure to a later date or to make vague conclusions that fail to articulate even a general plan for the provision of water services and infrastructure.

According to amici curiae, actual plans for water services and infrastructure cannot be created before local governments enact applicable zoning ordinances. However, the express language in former RMC section 18.06.404(d)(1)(b) does not require local governments or developers to submit complete, all-inclusive development plans prior to the approval of new zoning ordinances. Such a requirement would be redundant because Nevada's statutory scheme already requires developers to submit detailed plans regarding water and sewer services during later stages in the development process. *See, e.g.*, NRS 278.335; NRS 278.372; NRS 278.377; NRS 278A.540. As set forth above, the provision's plain language is subject to only one reasonable interpretation: local government must make a finding about plans for adequate services and infrastructure prior to the adoption of amendments to the master plan. In this finding, local government must set forth an estimate of the water services and infrastructure required to serve the proposed development facilitated by the zoning amendment and must state how the governing entity plans to meet this demand.

B. *Substantial evidence does not show that the City made a sufficient finding about plans for services and infrastructure*

[Headnotes 16]

After reviewing the record in this case, we conclude that substantial evidence does not show that the City made a sufficient

finding regarding how officials plan to meet the water demands and infrastructure needs generated by the proposed development in Cold Springs. When approving Ordinance 5809, the evidence shows that the Reno Planning Commission stated: ''As future development projects are brought forward, issues such as sanitary sewer, water service and other critical infrastructure needs will be addressed.'' In addition, the Reno City Council made the following statement: ''[W]hile the details of the provision of water and sewer will be required when the development is proposed, there is infrastructure in place that could be expanded, such as an existing sewer plant, and a water purveyor called Utilities, Inc. Alternatively, new utilities could be built by the developer.''

These statements do not satisfy the requirements of former RMC section 18.06.404(d)(1)(b) because they do not articulate even a general plan to meet the potential demands for water services and infrastructure generated by the zoning change. While the City is not required to set forth detailed, all-inclusive development plans for water services and infrastructure, former RMC section 18.06.404(d)(1)(b) did require something more than the deferral of the issue or broad, evasive conclusions about how officials can build or expand utilities if necessary. *See Annapolis Market v. Parker*, 802 A.2d 1029, 1045-46 (Md. 2002) (findings of fact should be meaningful and should not merely set forth broad conclusions, make boilerplate resolutions, or defer issues to a later date). The parties in this case agree that the existing water services and infrastructure cannot support the potential development in Cold Springs, and merely deferring the subject or broadly concluding that a developer could build new utilities if necessary oversimplifies complex water-supply issues. Because the City did not satisfy the applicable provision of the RMC, we conclude that the district court did not err by ordering the City to set aside Ordinance 5809.

CONCLUSION

We conclude that the City did not violate NRS 278.0282 by conditionally approving amendments to the Reno Master Plan prior to submitting the amendments to the Regional Planning Commission for review. The City complied with NRS 278.0282 because Resolution 6712 provided that the proposed master-plan amendments would become effective after the Regional Planning Commission determined that they conformed to the regional plan. We further conclude that the City violated former RMC section 18.06.404(d)(1)(b) because there is no substantial evidence showing that it made an adequate finding about planned water services and infrastructure before passing Ordinance 5809. According-

ly, we reverse the district court's finding that the City failed to properly amend the Reno Master Plan and affirm the district court's conclusion that the City violated former RMC section 18.06.404(d)(1)(b).

PARRAGUIRRE, C.J., and HARDESTY, DOUGLAS, CHERRY, SAITTA, and PICKERING, JJ., concur.

MICHAEL A. CARRIGAN, FOURTH WARD CITY COUNCIL MEMBER OF THE CITY OF SPARKS, APPELLANT, *v.* THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, RESPONDENT.

No. 51920

July 29, 2010 236 P.3d 616

Appeal from a district court order denying a petition for judicial review from a decision of the Nevada Commission on Ethics. First Judicial District Court, Carson City; William A. Maddox, Judge.

City council member filed petition seeking judicial review of written censure against him by Nevada Commission on Ethics for council member's failure to abstain from voting on matter due to potential conflict of interest. The district court denied petition. Council member appealed. The supreme court, DOUGLAS, J., held that: (1) voting by elected public officer on public issues is protected speech, (2) district court was required to apply strict scrutiny to determine whether statute defining commitments of officer that would require abstention from voting on public matters was substantially overbroad, and (3) statute was substantially overbroad.

Reversed.

PICKERING, J., dissented.

Chester H. Adams, City Attorney, and *Douglas R. Thornley*, Assistant City Attorney, Sparks, for Appellant.

Nevada Commission on Ethics and *Adriana G. Fralick*, Carson City, for Respondent.

Legislative Counsel Bureau Legal Division and *Brenda J. Erdoes*, Legislative Counsel, and *Kevin C. Powers*, Senior Principal Deputy Legislative Counsel, Carson City, for Amicus Curiae Legislature of the State of Nevada.

1. ADMINISTRATIVE LAW AND PROCEDURE.

   Supreme court, like the district court, reviews an appeal from an administrative decision for clear error or abuse of discretion.

2. APPEAL AND ERROR.

   The constitutionality of a statute is a question of law, and thus the supreme court's review is de novo.

3. CONSTITUTIONAL LAW.

   First Amendment applies to state governments through the Fourteenth Amendment. U.S. CONST. amends. 1, 14.

4. CONSTITUTIONAL LAW.

   Voting by an elected public officer on public issues is protected speech under the First Amendment. U.S. CONST. amend. 1.

5. CONSTITUTIONAL LAW.

   District court was required to apply strict scrutiny test, rather than lower standard of *Pickering* balancing test, in which court would balance interests of state employee in commenting on matters of public concern and interest of state in promoting efficiency of public services, in its determination of whether catchall statute defining ''commitment in a private capacity to the interests of others,'' so as to require public officer to refrain from exercising speech by abstaining from voting on certain public issues if his judgment would be materially affected by such commitment, to include those commitments substantially similar to other enumerated commitments or relationships, was impermissibly overbroad in violation of council member's protected political speech rights, in proceeding regarding city council member's request for review of written censure by Nevada Commission on Ethics for failure to abstain from voting on matter due to alleged conflict of interest; council member, unlike other state employees, was elected officer employed by the people. U.S. CONST. amend. 1; NRS 281A.420(8)(e) (2008).

6. CONSTITUTIONAL LAW; OFFICERS AND PUBLIC EMPLOYEES.

   Catchall statute defining a public officer's ''commitment in a private capacity to the interests of others,'' so as to require officer to refrain from exercising speech by abstaining from voting on certain public issues if his judgment would be materially affected by such commitment, to include those commitments substantially similar to other enumerated commitments or relationships, failed to sufficiently describe what relationships were included in statutory restriction, such that statute was not narrowly tailored to state's compelling interest in promoting integrity of public officers through disclosure of potential conflicts of interest, and thus statute's reach was substantially overbroad in its regulation of political speech rights of public officers under the First Amendment. U.S. CONST. amend. 1; NRS 281A.420(8)(e) (2008).

7. CONSTITUTIONAL LAW.

   A facial challenge requires striking a balance between the competing interests of protecting the exercise of free speech rights with the potential harm in invalidating a statute that may be constitutional in some of its applications. U.S. CONST. amend. 1.

8. CONSTITUTIONAL LAW.

   Because invalidating a statute for overbreadth is ''strong medicine,'' it should not be casually employed.

9. CONSTITUTIONAL LAW.

   Under a strict scrutiny standard, the United States Constitution demands a high level of clarity from a statute seeking to regulate constitutionally protected speech. U.S. CONST. amend. 1.

10. CONSTITUTIONAL LAW.
    An overbroad law tends to chill the exercise of First Amendment rights by sweeping within its ambit other activities that in ordinary circumstances constitute an exercise of protective First Amendment rights. U.S. CONST. amend. 1.
11. CONSTITUTIONAL LAW.
    Under a facial overbreadth challenge, a statute purporting to restrict speech should not be held void unless it is substantially overbroad in relation to the statute's plainly legitimate sweep. U.S. CONST. amend. 1.
12. CONSTITUTIONAL LAW.
    A strict scrutiny standard requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider whether the Nevada Commission on Ethics' censure of an elected public officer for alleged voting violations under NRS 281A.420(2)(c) violates the First Amendment.[2] NRS 281A.420(2)(c) sets forth one of the legal standards for determining whether a public officer must abstain from voting on a particular matter, based on the officer's ''commitment in a private capacity to the interests of others.'' NRS 281A.420(8) defines this commitment to include four specific prohibited relationships between a public official and others and describes a fifth catchall definition as ''[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.'' The catchall definition of a prohibited relationship by a public official in NRS 281A.420(8)(e) confronts the First Amendment on appeal.

We first conclude that voting by public officers on public issues is protected speech under the First Amendment. Because NRS 281A.420(2)(c) directly involves the regulation of protected speech by a public officer in voting, we next determine that the definitional statute NRS 281A.420(8)(e) must be strictly scrutinized under a First Amendment overbreadth analysis. Applying a strict scrutiny standard, we conclude that NRS 281A.420(8)(e) is unconstitutionally overbroad in violation of the First Amendment, as

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[1]THE HONORABLE RON PARRAGUIRRE, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

[2]NRS 281A.420 was formerly NRS 281.501. 2007 Nev. Stat., ch. 538, § 3.8, at 3372. While the Commission's decision referred to NRS 281.501, the parties' briefs have referred to the 2007 version of the statute, NRS 281A.420, which we likewise follow in this opinion.

it lacks necessary limitations to its regulations of protected speech. Consequently, the district court erred in its interpretation of NRS 281A.420(8)(e) and its application to NRS 281A.420(2)(c), and thus, we reverse the district court's order.

FACTS

Appellant Michael A. Carrigan was first elected to the Sparks City Council in 1999 and has twice been reelected. During each of his election campaigns, Carrigan's longtime professional and personal friend, Carlos Vasquez, served as his campaign manager. In addition to serving as Carrigan's campaign manager, Vasquez worked as a consultant for the Red Hawk Land Company. In that role, Vasquez was responsible for advising Red Hawk on various matters pertaining to the development of a hotel/casino project known as the Lazy 8.

In early 2005, Red Hawk submitted an application to the City of Sparks regarding the Lazy 8 project. The Sparks City Council set the matter for a public hearing. Before the hearing, and in light of the long-standing relationship between Carrigan and Vasquez, Carrigan consulted the Sparks City Attorney for guidance regarding any potential conflict of interest. The City Attorney advised Carrigan to disclose, on the record, any prior or existing relationship with Vasquez before voting on the Lazy 8 matter. Taking the City Attorney's advice, Carrigan made the following disclosure before casting his vote:

> I have to disclose for the record . . . that Carlos Vasquez, a consultant for Redhawk, . . . is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight.
>
> [T]herefore, according to [NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue.

A few weeks after Carrigan cast his vote, respondent Nevada Commission on Ethics received several complaints regarding a

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We acknowledge that the Legislature further amended NRS 281A.420 in 2009. 2009 Nev. Stat., ch. 257, § 9.5, at 1057. However, contrary to the assertions made by the dissent in footnote 5, we conclude that these amendments are insufficient to cure the statute's constitutional deficiencies. In particular, we note that the statute still does not provide sufficient limitations on what relationships may require abstention from voting. The language cited in footnote 5 of the dissent also does nothing to define the ''clear cases'' that require abstention from voting. Therefore, the statute remains overbroad and not the least restrictive means to promote the statute's goals. Accordingly, we reject the dissent's contention that this appeal should only be analyzed on an as-applied basis.

possible conflict of interest. The Commission reviewed the complaints and authorized an investigation.

Upon completion of the investigation, the Commission issued a written decision censuring Carrigan for violating an ethics law, NRS 281A.420(2), by failing to abstain from voting on the Lazy 8 matter.[3] The Commission found that Carrigan had improperly voted on the Lazy 8 ''matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [his] commitment in a private capacity to the interests of others.'' *See* NRS 281A.420(2)(c). To reach this conclusion, the Commission evaluated the legislative history of the definitions of prohibited relationships by a public official contained in NRS 281A.420(8) and determined that the Legislature enacted NRS 281A.420(8)(e) to cover ''commitments and relationships that, while they may not fall squarely within those enumerated in [NRS 281A.420(8)(a)-(d)], are substantially similar to those enumerated categories because the independence of judgment may be equally affected by the commitment or relationship.'' In particular, the Commission found that Carrigan's relationship with Vasquez came within the scope of NRS 281A.420(8)(e), in that the relationship ''equates to a 'substantially similar' relationship to those enumerated under [NRS 281A.420(8)(a)-(d)]'' and ''[is] illustrative of [relationships] contemplated by [NRS 281A.420(8)(e)].'' In other words, the Commission found that Carrigan should have known that his relationship with Vasquez fell within the catchall definition and prevented him from voting on Red Hawk's application for the Lazy 8 project.

Carrigan filed a petition for judicial review with the district court to challenge the Commission's decision. The district court denied the petition based on its determination that the state has a strong interest in having an ethical government, which outweighs a public officer's and state employee's protected free speech voting right. The court further rejected Carrigan's challenges to the constitutionality of the statute, based on overbreadth and vagueness. This appeal followed. The Legislature of the State of Nevada was granted permission to file an amicus brief in support of the Commission's position.

DISCUSSION

Carrigan challenges the constitutionality of the Commission's censure on several grounds: overbreadth, vagueness, and unconstitutional prior restraint on speech. To resolve this appeal, we focus on Carrigan's First Amendment challenge in which he argues

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[3]The Commission determined that Carrigan's action did not constitute a willful violation of NRS 281A.420(2), and thus, it did not impose a civil penalty. NRS 281A.480.

that NRS 281A.420(8)(e) is unconstitutional in violation of his free speech rights.[4] Carrigan asserts that voting by a public officer is protected speech and therefore the statute should be reviewed under a strict scrutiny analysis, and under that analysis, the statute must be declared unconstitutional because the statute is not narrowly tailored to meet a compelling government interest. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010). The Commission and the Legislature (as amicus) assert that the district court properly concluded that the statute should be reviewed under a less strict standard as outlined by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Under that standard, they argue, the interests of the state in preventing corruption outweigh Carrigan's free speech right to vote on an issue in which he has a disqualifying interest. Alternatively, the Commission contends that if strict scrutiny applies, NRS 281A.420 is constitutional because: ''(1) Nevada has a compelling state interest in promoting ethical government and guarding the public from biased decision makers; and (2) the statutory provisions requiring disqualified public officers to abstain from voting constitutes the least restrictive means available to further the state's compelling interest.''

In resolving this First Amendment challenge, we initially address whether voting on a particular matter by an elected public officer is protected speech under the First Amendment. Concluding that it is protected speech, we next consider Carrigan's overbreadth challenge. In doing so, we address the appropriate standard to apply in reviewing Carrigan's overbreadth challenge and determine that a strict scrutiny standard is required. Applying a strict scrutiny standard to the statute at issue, we conclude that subsection 8(e) is overbroad in violation of the First Amendment.[5]

Standard of review

[Headnotes 1, 2]

This court, like the district court, reviews an appeal from an ''administrative decision for clear error or abuse of discretion.'' *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112

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[4]In light of our resolution on Carrigan's overbreadth challenge, we need not address Carrigan's vagueness and prior restraint arguments in resolving this appeal. *See Director, Dep't Prisons v. Arndt*, 98 Nev. 84, 86, 640 P.2d 1318, 1320 (1982) (noting that ''[i]t is well settled that this court will not address constitutional issues unless the[y] are requisite to the disposition of the case'').

[5]The dissent disagrees with our analysis of this case, challenging our conclusions that subsection 8(e) of NRS 281A.420 is unconstitutionally overbroad and disputing the application of a strict scrutiny standard. The dissent's challenges to our conclusions are unpersuasive, however, as the dissent misunderstands the pertinent issue raised in this appeal. The dissent improperly focuses on the question of whether recusal is an appropriate requirement to promote

P.3d 1093, 1097 (2005). While the instant matter involves an appeal from an administrative decision, Carrigan's arguments on appeal present purely legal questions, which we review de novo. *Howard v. City of Las Vegas*, 121 Nev. 691, 693, 120 P.3d 410, 411 (2005). Also, because the constitutionality of a statute is a question of law, our review is de novo. *Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

Voting by public officers

The Ethics in Government statute at issue in this case is NRS 281A.420.[6] NRS 281A.420(2)(c) requires that

> a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [his] *commitment in a private capacity to the interests of others*.

(Emphasis added.) NRS 281A.420(8) defines the ''commitment in a private capacity to the interests of others'' as a commitment to a person:

> (a) Who is a member of his household;
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
> (c) Who employs him or a member of his household;
> (d) With whom he has a substantial and continuing business relationship; or

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the Legislature's goal of avoiding impropriety when a publicly elected official has a conflict of interest. We do not dispute that requiring recusal under certain circumstances is appropriate and related to addressing conflict of interest concerns. But that is not the issue on appeal. The issue on appeal is whether the statute that establishes the recusal requirement provides sufficient limitations and explanations concerning when recusal is required to avoid overreaching into unnecessary situations. In other words, the dissent focuses on whether the required conduct is appropriate, instead of focusing on whether the statute creating the required conduct is constitutional. The dissent, in essence, reviews this case under on an as-applied challenge concerning whether requiring recusal is allowed, instead of reviewing it as a facial challenge regarding whether the statute that creates the recusal requirement does so with sufficient limitation and clarity to avoid violating constitutional rights. We do not conclude that NRS 281A.420(8)(e) is unconstitutional because the Legislature can never require recusal; it is unconstitutional because the Legislature failed to establish the appropriate circumstances under which recusal can be required in accordance with constitutional protections. Because the dissent focuses on an entirely different issue than that raised in this appeal and addressed by this opinion, we do not respond further to the specific arguments made or legal authorities relied upon by the dissent.

[6]NRS 281A.010 provides that NRS Chapter 281A ''may be cited as the Nevada Ethics in Government Law.''

> (e) *Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection*.

(Emphasis added.) Central to this controversy is paragraph (e).

The act of voting by a public officer is protected speech under the First Amendment

[Headnotes 3, 4]

Initially, we must determine whether NRS 281A.420 regulates protected speech under the First Amendment. Under the First Amendment, ''Congress shall make no law . . . abridging the freedom of speech.'' U.S. Const. amend. I. The First Amendment applies to state governments through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). Although this court has not directly addressed whether voting on matters by an elected public officer is protected speech, other courts have recognized that ''[t]here is no question that political expression such as [a city council member's] positions and votes on City matters is protected speech under the First Amendment.'' *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999); *accord Connick v. Myers*, 461 U.S. 138, 145 (1983) (''[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.'' (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982))); *see also Miller v. Town of Hull, Mass.*, 878 F.2d 523, 532 (1st Cir. 1989) (stating that ''we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment''). Recently we recognized in *Commission on Ethics v. Hardy*, 125 Nev. 285, 296, 212 P.3d 1098, 1106 (2009), that ''voting on legislation is a core legislative function.''[7] Because voting is a core legislative function, it follows that voting serves an important role in political speech. Based on our recognition of voting as a core legislative function, and in connection with other jurisdictions' holdings that voting in a legislative setting is protected speech, we conclude that voting by an elected public officer on public issues is protected speech under the First Amendment.

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[7]Despite the dissent's assertions, we do not cite to *Hardy* for the propositions that First Amendment protection is extended to a local government official's vote on a land use matter, such a vote is core political speech, or that *Hardy* specifically speaks to the issue in this case. We do, however, cite to *Hardy* for the proposition that voting on legislation is a core legislative function and that political speech is a core function of a public officer. *Hardy*, 125 Nev. at 296, 212 P.3d at 1106.

Overbreadth

A strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues

[Headnote 5]

Having concluded that voting by an elected public officer on public issues is protected speech under the First Amendment, we must next determine the appropriate standard to apply in reviewing the constitutionality of NRS 281A.420(8)(e). Carrigan argues that a strict scrutiny standard applies because voting is protected free speech. The Commission contends, and the district court agreed, that Carrigan's free speech rights must be analyzed under the two-part balancing inquiry enunciated by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), because Carrigan, as an elected city council member, is a state employee. Therefore, the Commission argues that the state's interests, as Carrigan's employer, in establishing an efficient government must be balanced with Carrigan's free speech rights as an employee.

The *Pickering* balancing test is a lower standard of review used in situations involving a state employee. 391 U.S. at 568. This standard is based on the view that the state, as an employer, has a stronger interest in regulating an employee's speech than in regulating the speech of the general public, in order to promote efficiency in the public services it offers, while also recognizing that a citizen does not forfeit all free speech rights when working for the government. *Id*. Under the *Pickering* balancing test, the court must balance ''the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'' *Id*.

Carrigan's relationship with the state differs from that of most public employees, however, because he is an elected officer ''about whom the public is obliged to inform itself, and the 'employer' is the public itself, at least in the practical sense, with the power to hire and fire.'' *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007). While Carrigan is employed by the government, he is an elected public officer, and his relationship with his ''employer,'' the people, differs from that of other state employees. *Id*. Therefore, the district court erred in applying the *Pickering* balancing test.

Instead, a strict scrutiny standard applies. NRS 281A.420 establishes requirements for when a public officer must refrain from exercising speech by abstaining from voting on certain public issues. Thus, the statute deals directly with regulating speech, and as recognized in *Hardy*, political speech is a core function of a pub-

lic officer. Strict scrutiny is therefore the appropriate standard. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010) (stating that ''[l]aws that burden political speech are subject to strict scrutiny'' (internal quotations omitted)); *Nordyke v. King*, 563 F.3d 439, 460-61 (9th Cir. 2009) (stating that a law that directly regulates speech is subject to strict scrutiny).

NRS 281A.420(8)(e) is facially overbroad

[Headnotes 6-8]

We now consider Carrigan's overbreadth challenge to NRS 281A.420(8)(e) under the applicable strict scrutiny standard. In determining whether the statute is unconstitutionally overbroad, we must keep in mind that this is a facial challenge.[8] A facial challenge requires striking a balance between the competing interests of protecting the exercise of free speech rights—as an overbroad statute ''deters people from engaging in constitutionally protected speech''—with the potential harm in invalidating a statute that may be constitutional in some of its applications. *United States v. Williams*, 553 U.S. 285, 292 (2008). Because invalidating a statute for overbreadth is ''strong medicine,'' it should ''not be casually employed.'' *Id.* at 293 (internal quotations omitted).

[Headnotes 9-12]

Under a strict scrutiny standard, the United States Constitution demands a high level of clarity from a statute seeking to regulate constitutionally protected speech. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford*, 408 U.S 104, 108-09 (1972). An overbroad law tends to chill the exercise of First Amendment rights by sweeping '' 'within its ambit other activities that in ordinary circumstances constitute an exercise of' protective First Amendment rights.'' *City of Las Vegas v. Dist. Ct.*, 118 Nev. 859, 863 n.14, 59 P.3d 477, 480 n.14 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). Under a facial overbreadth challenge, a statute should not be held void '' 'unless it is substantially overbroad in relation to the statute's plainly legitimate sweep.' '' *Silvar v. Dist. Ct.*, 122 Nev. 289, 298, 129 P.3d 682, 688 (2006) (quoting *Coleman v. City of Richmond*, 364 S.E.2d 239, 243 (Va. Ct. App. 1988)). A strict scrutiny standard ''requires the Government to prove that the restriction furthers a com-

[8]While generally a facial challenge cannot be maintained by someone whose conduct the statute could validly regulate, there is an exception to this rule under First Amendment overbreadth challenges based on the danger that an overbroad statute's '' 'very existence may cause others not before the court to refrain from constitutionally protected speech or expression.' '' *City Council v.*

pelling interest and is narrowly tailored to achieve that interest.'' *Citizens United*, 558 U.S. at 340 (internal quotations omitted).[9]

Carrigan contends that NRS 281A.420(8)(e) is not narrowly tailored since the Commission arbitrarily determines whether a public officer's relationships are ''substantially similar'' to the other relationships listed in subsection 8. Carrigan argues that because the subsection 8(e) definition of ''[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection'' does not provide sufficient limitations on what relationships may require abstention from voting, the statute is overbroad and is therefore not the least restrictive means available to promote the statute's goals. The Commission contends that NRS 281A.420(8)(e) is constitutional because it promotes a compelling state interest in maintaining an ethical government and protecting the public from bias, and the restrictions constitute the least restrictive means available to further the state's compelling interest.

We agree with the Commission that promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest that is consistent with the public policy rationale behind the Nevada Ethics in Government Law. *See* NRS 281A.020 (public policy for Nevada Ethics in Government Law). Thus, arguably, NRS 281A.420(8)(e) meets the first requirement under a strict scrutiny standard; the statute furthers a compelling state interest. The statute fails, however, to meet the ''narrowly tailored'' requirement.

NRS 281A.420(2)(c) requires that a public officer refrain from voting when, among other things, ''the independence of judgment of a reasonable person in his situation would be materially affected by . . . his commitment in a private capacity to the interests of others.'' The phrase ''commitment in a private capacity to the interests of others'' is defined in part in NRS 281A.420(8)(e), which

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Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Thus, the Commission's arguments that the statute should not be declared invalid because it could be constitutionally applied to Carrigan are unavailing, and we need not consider them further.

[9]Strict scrutiny has been described as ranking ''among the most important doctrinal elements in constitutional law.'' Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1268 (2007). Strict scrutiny is distinct from other forms of review and ''varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a 'compelling state interest;' and demands that the regulation promoting the compelling interest be 'narrowly tailored.' '' Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal Hist. 355, 359-60 (2006) (footnotes omit-

in relevant part states that this includes ''a commitment to a person'' with whom the public officer has a ''commitment or relationship that is substantially similar'' to one of the relationships outlined in subsection 8. NRS 281A.420(8)(e).

The definition of a ''commitment in a private capacity'' in subsection 8(e) fails to sufficiently describe what relationships are included within NRS 281A.420(2)(c)'s restriction. As a result, the statute's reach is substantially overbroad in its regulation of protected political speech.

There is no definition or limitation to subsection 8(e)'s definition of any relationship ''substantially similar'' to the other relationships in subsection 8. This catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal. Thus, the statute has a chilling effect on the exercise of protected speech, for it threatens punishment for noncompliance, which ''deters people from engaging in constitutionally protected speech.'' *Williams*, 553 U.S. at 292.

Based on the overly broad definition in NRS 281A.420(8)(e) of what constitutes a ''commitment in a private capacity,'' NRS 281A.420(2)(c)'s abstention requirement for this category of relationships lacks necessary limitations to its protected speech regulation. Thus, NRS 281A.420(8)(e)'s application to a wide range of differing commitments and relationships is not narrowly tailored. Accordingly, NRS 281A.420(8)(e) is substantially overbroad, sweeps within its control a vast amount of protected speech, and violates the First Amendment.

Therefore, we declare NRS 281A.420(8)(e) unconstitutionally overbroad in violation of the First Amendment and reverse the district court's order.[10]

HARDESTY, CHERRY, SAITTA, and GIBBONS, JJ., concur.

PICKERING, J., dissenting:

Before today, no published decision has held that an elected local official engages in core political speech when he or she votes on an individual land use matter. Likewise, no published decision

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ted); *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) (''When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.''); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999) (''the Government bears the burden of identifying a substantial interest and justifying the challenged restriction'').

[10]Because issues as to other portions of the statute are not raised, this opinion only addresses these limited sections and does not make a determination as to the remainder of the statute.

reviewing the ethical propriety of such a vote has subjected the applicable legislative prohibition against conflicts of interest to strict scrutiny or invalidated it on overbreadth grounds. Because I believe charting this course is both unprecedented and unwise, I respectfully dissent.

Separation of powers

Our decision in *Commission on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009), on which the majority relies, did not extend First Amendment protection to a local government official's vote on a land use matter[1] or declare such a vote to be core political speech. At issue in *Hardy* was whether, for separation-of-powers purposes, a member of the Nevada Legislature engages in core legislative speech when voting on state legislation. *Id.* at 293-97, 212 P.3d at 1104-07. Citing *Brady v. Dean*, 790 A.2d 428 (Vt. 2001), we held that the Legislature could not delegate to an executive branch agency—the Ethics Commission—the power to police state legislators' conflicts of interests in voting. *Hardy*, 125 Nev. at 294-96, 212 P.3d at 1105-06. The basis for our decision was not that the First Amendment requires strict scrutiny of conflict-of-interest rules for elected officials who vote. It was that Nevada's constitutional provisions vesting authority in the Legislature to discipline its members, Nev. Const. art. 4, § 6, and mandating separation of powers at the state level, *id.* art. 3, § 1(1), prohibit the Legislature from outsourcing member discipline to an executive branch agency. *Hardy*, 125 Nev. at 298, 212 P.3d at 1108. Only the Legislature, in other words, can discipline its members for legislative speech, including votes violating that body's conflict-of-interest rules.

Hardy doesn't speak to the issue in this case, where a state ethics-in-government statute is being applied to a local governmental official who votes. A local government exercises such powers as the Legislature and Constitution confer. Nev. Const. art. 8, § 8; *see* 2 Eugene McQuillin, *The Law of Municipal Corporations* § 4:5 (3d ed. 2006). A corollary proposition is that, ''[u]nless restricted by the constitution, the legislature may prescribe the qualifications, tenure, and duties of municipal officers.'' 2 McQuillin, *supra*, § 4:124, at 356. While Nevada's separation-of-powers guarantee prohibits the Legislature from outsourcing member discipline to an executive branch agency, nothing in our Constitution limits the Legislature's authority to subject local governmental officials to state ethics laws administered by the Nevada Ethics Commission. Indeed, the *Brady* decision, on which *Hardy* principally relies, em-

[1]The Sparks City Council vote underlying this proceeding came before us in *Adams v. City of Sparks*, Docket Nos. 49504/49682/50251 (Order of Affirmance, July 21, 2009), where we held that the Lazy 8 vote represented a land

phasizes that it only addresses state-level legislators and does not call into question conflict-of-interest statutes that apply to local governmental officials. *See Brady*, 790 A.2d at 433 (the ''conflict-of-interest cases on which plaintiffs rely all involved elected officials of political subdivisions such as cities and towns which do not raise similar separation-of-power concerns'').[2]

First Amendment and acts of governance

An elected official's vote on a matter of public importance is first and foremost an act of governance. The official has broad common law and, at the federal level, Speech and Debate Clause immunity for his vote. *See* S. Sherr, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 Yale L.J. 233, 235-36 (1991) (discussing U.S. Const. art. I, § 6). But thus far the Supreme Court has not overlaid that immunity with First Amendment protection for the act of governance that an official's vote on a public matter represents. *Id*. at 245.

Whether the First Amendment protects an official's vote qua governance was raised but not decided in *Spallone v. United States*, 493 U.S. 265 (1990), an appeal of a contempt order issued against the City of Yonkers and its city council members for not passing an ordinance required by a federal consent decree. Justice Brennan would have upheld the contempt citation against both the City and its council members and reached the First Amendment issue. *Id*. at 281-306 (dissenting). Writing for four members of the Court, he characterized as ''unpersuasive'' the argument that the First Amendment protected a city council member's vote ''yea'' or ''nay'' on the ordinance to which the City had stipulated in the federal consent decree:

> Petitioner Chema claims that his legislative discretion is protected by the First Amendment as well. Characterizing his vote on proposed legislation as core political speech, he contends that the Order infringes his right to communicate with his constituents through his vote. This attempt to

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use decision reviewable, if at all, by a petition for judicial review under NRS 278.3195(4). Although policy-setting land use planning ordinances qualify as legislative, local governments exercise quasi-adjudicative or administrative powers when they decide individual zoning or land use matters. *See Garvin v. Dist. Ct.*, 118 Nev. 749, 765, 59 P.3d 1180, 1190-91 (2002) (noting that our ballot initiative law holds individual land use decisions to be non-legislative and hence not appropriate for direct democratic vote). Conflict-of-interest rules and due process concerns apply to individual land use decisions. *See Hantges v. City of Henderson*, 121 Nev. 319, 325-27, 113 P.3d 848, 851-53 (2005) (dictum).

[2]Carrigan makes no argument that applying Nevada's ethics laws violates the Nevada Constitution's home-rule provision.

> recharacterize the common-law legislative immunity doctrine into traditional First Amendment terms is unpersuasive. *While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance* . . . .

Id. at 302 n.12 (emphasis added). *See Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) (en banc) (vacating as moot an earlier panel opinion that held, pre-*Spallone*, that Congress could not, consistent with the First Amendment, coerce the votes of the District of Columbia Council; noting that this was an ''important'' issue ''of first impression'' that ''would carry broad implications'' for federal, state, and local governments and might ''open[ ] the door to more litigation than we can now appreciate''); *Zilich v. Longo*, 34 F.3d 359, 363-64 (6th Cir. 1994) (holding that a former city council member's First Amendment rights were not violated by a resolution authorizing suit against him for having violated the council's residency requirement, even though alleged to be in retaliation for his politics: ''Congress frequently conducts committee investigations and adopts resolutions condemning or approving of the conduct of elected and appointed officials, groups, corporations and individuals''; the ''manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views,'' including the plaintiff's ''right to oppose the mayor'' and the ''defendants' right to oppose'' the plaintiff ''by acting on the residency issue'' (internal quotation and citation omitted)); *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009) (dismissing appeal after vacating panel decision, 566 F.3d 515, *reh'g granted*, 576 F.3d 531, that had concluded that elected local and state government officials' decision-making represents political speech, requiring the Texas Open Meeting Act to survive strict scrutiny review); *cf. Doe v. Reed*, 561 U.S. 186, 194-96, 199 n.2 (2010) (recognizing that a citizen engages in both expressive and legislative speech in signing a referendum petition and declining strict scrutiny review of Washington's Public Records Act's application to signers who wished to remain anonymous).

Voting by a public official is conduct—an act of governance. Still, as Justice Brennan noted in *Spallone*, a public official's vote also ''arguably contains a communicative element,'' 493 U.S. at 302 n.12; an elected official's vote defines his beliefs and positions in a way words alone cannot. Thus, the First Amendment was held to protect the communicative element in a public official's vote in *Miller v. Town of Hull, Mass.*, 878 F.2d 523 (1st Cir. 1989), on which the majority relies.

Miller was a retaliation case under 42 U.S.C. § 1983. In *Miller*, the First Circuit affirmed a judgment after a jury trial awarding

elected members of a town redevelopment authority damages against the board of selectmen who removed them, the jury found, not for a permissible reason but in retaliation for their vote on a housing development for the elderly. 878 F.2d 523. The expressive component of the redevelopment authority members' votes in *Miller* was what was singled out and punished: The board members were retaliated against for *how* they voted, not *because* they voted.

There is a difference the majority does not acknowledge between ''retaliatory First Amendment claims' and 'affirmative' First Amendment claims, such as 'facial challenges to statutes.'" *Velez v. Levy*, 401 F.3d 75, 97 (2d Cir. 2005) (quoting *Greenwich Citizens Comm. v. Counties of Warren*, 77 F.3d 26, 31 (2d Cir. 1996)). Because a First Amendment retaliation claim succeeds does not mean that the right vindicated is absolute, or that a statute that implicates such a right while regulating related conduct in a content-neutral way must pass strict scrutiny to survive facial challenge. First Circuit cases that have followed *Miller* make the point unmistakably. Thus, in *Mullin v. Town of Fairhaven*, 284 F.3d 31, 37 (2002), the First Circuit refined *Miller*, stating that, while ''[w]e have extended First Amendment protection to votes on 'controversial public issue[s]' cast by 'a member of a public agency or board[,]' . . . [*t*]*his protection is far from absolute*.'' *Mullin*, 284 F.3d at 37 (emphasis added) (quoting *Miller*, 878 F.2d at 532). The court then proceeded to analyze Mullin's First Amendment retaliation claim under the flexible *Pickering v. Board of Education*, 391 U.S. 563 (1968), standard the majority rejects—paradoxically, at the same time it embraces *Miller*. *See also Mihos v. Swift*, 358 F.3d 91, 109 (1st Cir. 2004) (''we articulate the First Amendment right at stake here as the right of a public official to vote on a matter of public concern properly before his agency without suffering retaliation from the appointing authority *for reasons unrelated to legitimate governmental interests*''; applying *Pickering* balancing (emphasis added)).

The *Pickering*/*Garcetti v. Ceballos*, 547 U.S. 410 (2006), line of cases speaks to the First Amendment rights of public employees and holds that, ''when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.'' *Garcetti*, 547 U.S. at 421. Restricting a public employee's official speech ''does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.'' *Id*. at 421-22.

The majority deems *Pickering*/*Garcetti* inapplicable because Carrigan is elected and his constituents, not the government,

are his ultimate employer with the power to hire or fire him. But this is an overly simplistic view. It does not take into account the Legislature's control over local governments in our state constitutional scheme and the constitutional and policy-based imperative of non-self-interested governmental decisionmakers, especially in the quasi-adjudicative setting. Even though Carrigan is an elected official, I thus would affirm the district court's ruling that *Pickering*/*Garcetti* balancing applies to Carrigan's challenge to Nevada's Ethics in Government Act. *See Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010) (applying *Pickering*/*Garcetti* balancing, not strict scrutiny, to challenge by judge campaigning for reelection to ethics regulations; rejecting the argument that *Pickering*/*Garcetti* depends on who can hire or fire the government official and noting that, ''It is small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election, especially if that litigant were unable to muster the resources to combat a well-financed, corrupt judge around election time.''); *Shields v. Charter Tp. of Comstock*, 617 F. Supp. 2d 606, 615-16 (W.D. Mich. 2009) (applying *Pickering*/*Garcetti* to elected member of the Township Board and noting that, ''[u]nlike an ordinary citizen, [Shields] represents the Township when he speaks at a public board meeting [making] his constitutional rights . . . more analogous to the employee in *Garcetti* than to a private citizen sitting in the audience'').

Strict scrutiny v. rational basis or intermediate review

Here, Carrigan has not brought a retaliation claim. He challenges whether Nevada's Ethics in Government Law can constitutionally apply to him, even when the purpose is prophylactic—to avoid conflicts of interest—not retaliatory. Of note, the Law does not regulate *how* councilmember Carrigan votes. It provides that he should not vote at all on ''a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others.'' NRS 281A.420(2)(c).[3] Its target is conduct—acts of governance—not personal, expressive speech.

A law limiting an elected official's ability to vote on matters as to which he has an actual or apparent conflict of interest does not trigger strict scrutiny. It commands either rational basis, *Peeper v. Callaway County Ambulance District*, 122 F.3d 619, 622-23 (8th Cir. 1997), or at most the intermediate level of review given laws

[3]The Ethics in Government Act was amended in 2009, which resulted in some of its sections being renumbered. Unless otherwise noted, I have followed the majority's convention and refer to the pre-2009 version of the Act in this dissent.

regulating conduct that incidentally regulate speech, *see Clarke v. United States*, 886 F.2d 404, 413-14 (D.C. Cir. 1989) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc) (alternative holding), as applied in candidate ballot access cases. *Monserrate v. New York State Senate*, 599 F.3d 148 (2d Cir. 2010).

At issue in *Peeper* was a board resolution prohibiting a newly elected ambulance board member from voting on certain matters because her husband worked for the ambulance district. 122 F.3d at 620-21. Although the Eighth Circuit invalidated parts of the resolution because it went further than the state conflict-of-interest law required, it used rational basis review and rejected strict scrutiny as inappropriate. *Id.* at 22-23. In its view, ''[a]n individual's right to be a candidate for public office under the First and Fourteenth Amendments is nearly identical to one's right to hold that office,'' making it appropriate to ''employ the same constitutional test for restrictions on an officeholder as we do for restrictions on candidacy.'' *Id.* at 622. Quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972), and *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983), *Peeper* noted that the existence of barriers to a candidate's right of access to the ballot does not in and ''of itself compel close scrutiny,'' and stressed that, ''[t]he Supreme Court has upheld restrictions on candidacy that are unrelated to First Amendment values and that protect the integrity and reliability of the electoral process itself.'' 122 F.3d at 622-23. *Accord Franzwa v. City of Hackensack*, 567 F. Supp. 2d 1097 (D. Minn. 2008) (rejecting First Amendment challenge by an elected board member to his temporary suspension by his fellow board members from voting privileges for what they erroneously believed was his disqualification; judged under a rational basis standard, the board, which had the power to judge the qualifications of its members, reasonably believed that the plaintiff's residency qualification was in doubt).

The Second Circuit pursued much the same analysis in *Monserrate v. New York State Senate*, 599 F.3d 148 (2d Cir. 2010), which presented a First Amendment challenge to the New York State Senate's expulsion of an elected senator following his domestic violence conviction. As the Eighth Circuit did in *Peeper*, the Second Circuit drew on *Anderson v. Celebrezze*, and analogized post-election discipline of elected officials to pre-election candidacy restrictions. *Id.* at 154-55 (also citing *Burdick v. Takushi*, 504 U.S. 428, 432 (1992)). In both the pre- and post-election context, ''the rights of voters and the rights of candidates [or elected officials] do not lend themselves to neat separation.'' *Id.* (internal quotation omitted). The court affirmed that ''[t]he district court did not err in declining to apply strict scrutiny,'' and elaborated that:

> . . . it is an erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Rather, it is useful to look to a more flexible standard in which the rigorousness of our inquiry into the propriety of a state [action] depends upon the extent to which a challenged [action] burdens First and Fourteenth Amendment rights. When such rights are subjected to severe restrictions, the [action] must be narrowly drawn to advance a state interest of compelling importance; but when such rights are subjected to less than severe burdens, the State's important . . . interests are generally sufficient to justify the restrictions. Therefore, if the burden imposed is less than severe and reasonably related to the important state interest, the Constitution is satisfied.

Id. (internal quotations and citations omitted).

''It seems clear enough,'' the court held, that ''this flexible framework, used in ballot access cases, is not limited to the pre-vote context,'' but applies as well to cases applying post-election restrictions on elected officials. *Id*. at 155. Given the New York Senate's ''important interest in upholding its reputation and integrity,'' and the ''reasonab[le] relat[ionship]'' between that interest and Monserrate's expulsion, the court denied Monserrate relief.[4] *Id*. at 155-56. In so doing, it noted that the expulsion had the effect of depriving his constituents of elected representation until a successor was chosen. *Id*. at 156. Because the voters of every senate district were likewise subject to having the senate's expulsion rules applied to their elected representative, this did not offend their First or Fourteenth Amendment rights. *Id*. at 156-57.

No doubt requiring Carrigan to recuse himself on matters involving his longtime friend and then-current campaign manager,

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[4]Had Monserrate been expelled to punish him for *speech* outside the senate as opposed to *conduct*, a different analysis and result would obtain. Thus, in *Bond v. Floyd*, 385 U.S. 116 (1966), the Supreme Court invalidated a state's refusal to seat a federal legislator based on his outspoken opposition to the Selective Service system and the Vietnam war. *Jenevein v. Willing*, 493 F.3d 551 (5th Cir. 2007), cited by the majority to support strict scrutiny review, makes the same point. *Jenevein* involved an elected judge's televised broadcast rebuking a lawyer for improper attacks on the judiciary. *Id*. at 553-57. While the court invalidated part of the censure the judge received based on the judge's First Amendment right to comment publicly on a matter of public interest, it upheld the censure to the extent the judge used his courtroom and robes to stage his broadcast. *Id*. at 560-61. The judge's First Amendment right to speak out on a matter of public concern that involved him did not give him the right to use his courtroom as a pulpit. Of note, the Seventh Circuit rejected *Jenevein*'s strict scrutiny approach in favor of the more capacious *Pickering*/*Garcetti* standard, which accommodates both the public interest in unbiased judicial officers and the individual elected officer's First Amendment interests. *Siefert*, 608 F.3d at 985.

Vasquez cost Vasquez, his other clients, and others of Carrigan's constituents their representation by Carrigan, and deprived Carrigan of his right to express himself by voting on matters involving Vasquez or Vasquez's lobbying clients. Applying *Monserrate*'s ''flexible framework,'' however, the burden is justified.

Statutorily imposed limits on a local government official's vote on a matter as to which his personal loyalties conflict, or appear to conflict, with his public duties do not severely or discriminatorily burden the official or his constituents. A public official, under Nevada's Ethics in Government Law, is not required to recuse so long as the official's ''commitment in a private capacity to the interest of others . . . is not greater than that accruing to any other member of the general business, profession, occupation or group.'' NRS 281A.420(2)(c). It is only when, as the Commission found here, ''the independence of judgment of a reasonable person in [the public officer's] situation would be materially affected by . . . his commitment in a private capacity to the interests of others'' that recusal is required. *Id.* Even then, the official ''may otherwise participate in the consideration of [the] matter,'' NRS 281A.420(2); he just may not vote on or advocate the passage or defeat of the matter in which he has a disqualifying personal interest. At least in the adjudicative setting, moreover, recusal is the preferred, more narrowly tailored way to avoid corruption or the appearance of corruption. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 360 (2010) (discussing *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), as ''limited to the rule that the judge must be recused, not that the litigant's political speech could be banned''); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (noting that, in the adjudicative context, a state ''may adopt recusal standards [for its elected judges] more rigorous than due process requires'').[5]

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[5]Acknowledging the difficult balance between constituents' rights to public representation and personal interests giving rise to disqualifying conflicts of interest, the 2009 Legislature added the following paragraph to NRS 281A.420:

> Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this [statute] are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's . . . commitment in a private capacity to the interests of others.

NRS 281A.420(4)(b) (2009). This clarifying language was not part of NRS 281A.420 when Carrigan voted on the Lazy 8 matter and the Commission and the district court considered whether he violated the statute in his vote. Even accepting arguendo that strict scrutiny applies, the passage of this amendment militates against the overbreadth analysis the majority pursues and suggests the more prudent course would be to analyze this appeal on an as-applied basis.

The justification for requiring recusal in matters involving conflicts of interest on the part of elected public officials is strong. The Legislature passed Nevada's Ethics in Government Law ''[t]o enhance the people's faith in the integrity and impartiality of public officers and employees [by establishing] appropriate separation between the roles of persons who are both public servants and private citizens.'' NRS 281A.020(2)(b). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld statutory limits on citizens' direct candidate contributions in order to ensure ''against the reality or appearance of corruption'' of elected officials—deeming the government's interest in preventing actual or perceived quid pro quo corruption of elected officials sufficient to justify the undeniable incursion on private citizens' First Amendment rights such contribution limits represent. In *Citizens United*, 558 U.S. at 357, the Supreme Court reaffirmed *Buckley*. If the government's interest in ''ensur[ing] against the reality or appearance of corruption,'' *id.*, can justify the direct contribution limits upheld in *Buckley*, Nevada's concern with local government official's actual or apparent conflicts of interest surely justifies the limited disqualification stated in NRS 281A.420(2)(c).

At common law, ''[a] member of a local governing board is deemed to be a trustee for the citizens of the local entity.'' 2 *Antieau on Local Government Law* § 25.08[1] (2009). In such an official, ''[t]he law tolerates no mingling of self-interest. It demands exclusive loyalty, and if a local legislator has an interest that is of such personal importance that it impairs his or her capacity to act in the interest of the public, he or she cannot vote.'' *Id*. Numerous cases so hold, applying long-established common law. *See* 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 126 (2010) (''A council member who has a direct personal interest, a financial interest, or an appearance of impropriety in a matter coming before the council is not eligible to vote in that matter on the grounds that to allow such a practice violates public policy. The proper thing to do in such a case is for the member to recuse or disqualify himself, or abstain from voting.'' (footnotes omitted) (collecting cases dating back as far as 1878)). Statutes regulating conflicts of interest by public officials supplement these common law rules, both in Nevada and elsewhere. *See* M. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. Rev. 161, 175-79 (1989).

''A 'universal and long-established' tradition of prohibiting certain conduct creates 'a strong presumption' that the prohibition is constitutional.'' *Republican Party of Minn.*, 536 U.S. at 785 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375-77 (1995) (Scalia, J., dissenting)). I submit that this presumption applies here.

Overbreadth

Carrigan does not contest the Ethics Commission's findings, which the district court upheld, that Carrigan's relationship with Vasquez was disqualifying.[6] Nor does the majority debate that, as applied, NRS 281A.420(2) and (8) legitimately required Carrigan to abstain from voting on the Lazy 8 matter. Majority opinion *ante* at 282 n.5. Nonetheless, Carrigan wins reversal because the majority concludes that, since strict scrutiny applies, so does the overbreadth doctrine, and that NRS 281A.420(8)(e), read in isolation from the rest of the statute to which it relates, is unconstitutionally overbroad. With this conclusion I cannot agree.

Overbreadth analysis is an exception to the basic rule that ''a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.'' *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The rule against hypothetical challenges rests ''on more than the fussiness of judges''; it ''reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.'' *Id.* at 610-11. As an exception to the rule against deciding cases based on hypotheticals, the overbreadth doctrine is strictly limited. It applies only to ''statutes which, by their terms, seek to regulate only spoken words,'' burden ''innocent associations,'' or delegate ''standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints.'' *Id.* at 612-13 (internal quotation omitted).

In *Broadrick*, the Court rejected an overbreadth challenge by Oklahoma government employees to a state personnel statute patterned on the federal Hatch Act, which proscribes partisan political activities by government employees. Concededly, the Act's broad terms could be read to prohibit some constitutionally protected speech. However, it fairly applied to the conduct engaged in by the employees before the Court. Since the statute sought ''to regulate political activity in an even-handed and neutral manner'' and reached ''a substantial spectrum of conduct that [was] manifestly subject to state regulation,'' the government employees' overbreadth challenge failed. *Id.* at 616. In reaching this conclusion, the Court cautioned against too easy or promiscuous resort to overbreadth analysis in conduct cases. The function of

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[6]Carrigan was in the final weeks of a contested reelection when he voted on the Lazy 8 matter. His campaign manager, fund raiser and longtime political adviser was Carlos Vasquez, whose lobbying client was the Lazy 8 on whose application Carrigan voted. The Commission found:

> facial overbreadth adjudication . . . attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from ''pure speech'' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid . . . laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id. at 615.

Broadrick disposes of Carrigan's overbreadth challenge. Here, the challenged statute applies to conduct: the governmental act of voting on a local land use matter. Even granting that an elected official's vote on a public matter carries an element of expressive speech, the statute is content-neutral. It regulates *when* an official may or may not vote, not *how* he or she should vote. Its justification lies in avoiding corruption or the appearance of corruption and in promoting the public's faith in the integrity of its local government. Such a statute, applying in a content-neutral way to both conduct and speech in the government setting, should not fall to overbreadth analysis.

The majority does not identify the protected conduct that NRS 281A.420(8)(e)'s declared overbreadth improperly catches in its sweep. *But see United States v. Stevens*, 559 U.S. 460, 473-74 (2010) (''[t]he first step in overbreadth analysis is to construe the challenged statute'' preparatory to deciding whether ''a substantial

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> A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant, and campaign manager [Vasquez], who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

As the district court noted, the legislative history of NRS 281A.420 supports the Ethics Commission's finding that this relationship was disqualifying. *See* Hearing on S.B. 478 Before Senate Comm. on Gov't Affairs, 70th Leg. (Nev., March 30, 1999) (while a prior campaign association would not necessarily be disqualifying, if the relationship ''was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person'').

number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep'' (quotations and citations omitted)). Instead, the majority offers the *ipse dixit* that ''[t]he definition of a 'commitment in a private capacity' in subsection 8(e) fails to sufficiently describe what relationships are included within NRS 281A.420(2)(c)'s restriction. As a result, the statute's reach is substantially overbroad.'' Majority opinion *ante* at 288.[7]

Read in isolation and parsed word-for-word, paragraph (e) of NRS 281A.420(8) can be seen as imprecise. But it is not free-standing. It refers to the rest of NRS 281A.420, which explains when disqualification is required (situations in which ''the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others,'' NRS 281A.280(2)); identifies the types of relationships that are disqualifying (household, family, employment, or business, NRS 281A.280(8)(a)-(d)); and then, under those headings, provides for disqualification based on ''[a]ny other commitment or relationship that is substantially similar'' to those listed, NRS 281A.420(8). Given the long common law history disqualifying local officials from voting on matters as to which they have conflicts of interest—and the elusive nature of conflicts of interest—the statute could have ended with the general proscription in NRS 281A.420(2) and passed muster. *Cf.* 2 Antieau, *supra*, § 25.08[1], at 25-47 (''The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case. No definitive test has been devised.''). Stating a general rule, followed by a list that ends with a catchall, does not make a statute unconstitutionally overbroad:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can suffi-

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[7]This statement seems more appropriate to a void-for-vagueness than an overbreadth challenge but Carrigan does not have a legitimate vagueness challenge. The Ethics Commission is available to rule in advance on whether a disqualifying conflict of interest exists; Carrigan admits he had six months lead time before the Lazy 8 application came to a vote; his sanction was a civil rebuke, not a criminal penalty. He thus cannot prevail on a void-for-vagueness challenge. *Compare Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (''a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim . . . for lack of notice''), *with Broadrick*, 413 U.S. at 608 n.7 (rejecting the government employees' vagueness challenge to lack of notice given that there was a review board available, as here, to rule in advance on the permissibility of their proposed conduct).

> ciently understand and comply with, without sacrifice to the public interest.

United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973); *see* 2A Norman A. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:17, at 358-60 (2007) (''Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words,'' thus inherently limiting the statute's terms).

* * * * *

The vote in this case did not signify much in the end, because Carrigan's vote was in the minority. But applying First Amendment strict scrutiny and overbreadth precepts to invalidate state conflicts-of-interest laws that govern local governmental officials who vote is a mistake that I fear opens the door to much litigation and little good.